Supreme Court, U.S.
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No. 97-971331

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNION SECURITY LIFE INSURANCE COMPANY, PETITIONER

v.

EVELYN CROCKER, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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80 pp

QUESTION PRESENTED

In this case, the Alabama Supreme Court initially affirmed a $2 million judgment against Union Security, which consisted predominantly of punitive damages. After this Court granted certiorari and remanded for further consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), the Alabama Supreme Court ordered a remittitur to $1 million. The following question is presented:

Whether the $1 million exaction in this case is unconstitutionally excessive given that (i) Union Security itself committed no misconduct but is being held liable solely on a theory of vicarious liability; (ii) the Alabama courts expressly found that the conduct in this case was an "isolated incident"; (iii) the maximum economic injury sustained by respondent is $16,000, and there is no evidence in the record of emotional distress; (iv) the maximum fine for violations of Alabama's insurance code is $1,000; and (v) the revenue derived, and therefore the maximum profit, from the alleged misconduct was under $1,700.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Union Security Life Insurance Company ("Union Security")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama on remand (App., *infra,* 1a-16a) is not yet reported. The original opinion of the Supreme Court of Alabama (App., *infra,* 17a-27a) is reported at 667 So. 2d 688. The relevant orders of the Circuit Court of Choctaw County (App., *infra,* 28a-43a) are unreported.

JURISDICTION

The Supreme Court of Alabama rendered its decision on remand on August 15, 1997, and a timely application for rehearing was overruled on November 21, 1997 (App., *infra,* 44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This is the second time that this case has come before this Court. It involves a punitive damages award rendered against Union Security in Alabama state court. A jury returned a $5 million general verdict against Union Security and a co-defendant, First Alabama Bank of Choctaw. After the trial court ordered a remittitur to $3 million, the bank entered into a settlement under which it paid respondent $1 million, leaving a $2 million liability on Union Security. The Alabama Supreme Court affirmed. This Court then granted certiorari, vacated the Alabama Supreme Court's judgment, and remanded for further consideration in light of *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996), which established three guideposts for determining whether a punitive

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[1] Petitioner Union Security Life Insurance Company is a wholly owned subsidiary of American Security Insurance Company. Petitioner has no subsidiaries.

award is unconstitutionally excessive. On remand, the Alabama Supreme Court cut the judgment in half. In concluding that a $1 million judgment would not be excessive, the Alabama Supreme Court made no effort to calibrate the punitive damages to the degree of reprehensibility of Union Security's conduct as required under the first *BMW* guidepost and affirmatively ***refused*** to apply the third *BMW* guidepost, which calls for a comparison of the punitive damages with the legislatively established fines for comparable misconduct.

We submit that the Alabama Supreme Court has in essence defied this Court's decision in *BMW* and that summary reversal is appropriate. In the alternative, the Court should grant the petition and order plenary briefing and argument so as to provide further guidance as to the proper application of the *BMW* guideposts.

1. *Union Security's Credit Life Insurance Business*. Union Security sells a range of credit-related insurance products, including group credit life insurance, which pays off the balance of a loan in the event an insured debtor dies during the term of the loan. R. 374, 530.[2] Generally, group credit life is sold by the lender to the debtor pursuant to an agency contract with the insurance company. App., *infra*, 18a. During the time period relevant to this case, First Alabama Bank's loan officers were authorized to sell group credit life on behalf of Union Security. *Id*. R. 302, 476.[3]

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[2] The designation "R. ___" refers to the Reporter's Transcript of the trial below. The designation "C. ___" refers to the Clerk's Record, which is comprised of pleadings, motions, memoranda of law, and trial exhibits. The designation "Supp. C. ___" refers to the Supplemental Record on Appeal, which is comprised of an affidavit made part of the record by the Alabama Supreme Court.

[3] First Alabama Bank is a state-wide bank that purchased Choctaw Bank in 1986 and merged operations with it in 1988. R. 734. Union Security's contract was with First Alabama Bank, but only First Alabama Bank of Choctaw was named as a defendant in this case. For purposes of this petition, the term "First Alabama" will refer to the broader entity, and the term "First Alabama—Choctaw" will refer to the specific defendant.

During the period relevant to this case, Union Security required that all individuals seeking credit life insurance for First Alabama loans exceeding $10,000 fill out a one-page form entitled "Statement of Debtor's Physical Condition" (hereinafter "Health Statement"). App., *infra*, 18a; R. 483; C. 326. The form, as it existed at the relevant time, asked whether the debtor had experienced any of the following nine conditions within the preceding five years: cancer, diabetes, epilepsy, high blood pressure, heart disease, respiratory disorder, kidney disease, nervous disorder, and digestive disorder. For each condition, the form contained a box labeled "YES" and a box labeled "NO." For any "YES" answers, the form requested details of treatment, dates, diseases treated, and the treating physician's name and address. Directly beneath that disclosure section, the form contained the following certification: "I hereby declare that, to the best of my knowledge and belief, I am now in good health and that I have read the above questions and that the answers thereto are true and correct." Near the bottom of the page was a line for the debtor's signature. See C. 326.

It is Union Security's uniform policy to deny insurance to any debtor who has checked the "YES" box for any of the nine listed medical conditions. App., *infra*, 19a; R. 300-301, 342-343, 509, 522-523. On the other hand, if all nine "NO" boxes are checked, Union Security takes the applicants at their word and authorizes issuance of coverage. App., *infra*, 19a; R. 301, 304-305, 351-353.

Union Security does not conduct an independent investigation of the accuracy of the Health Statements before authorizing issuance of coverage (no doubt because the vast majority of Health Statements are accurate). App., *infra*, 19a; R. 305, 306.[4] If, however, the debtor dies within the policy's one-year contestability

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[4] Union Security receives between 2,000 and 6,000 Health Statements per month. R. 299, 423. Verifying the accuracy of each applicant's Health Statement not only would be prohibitively expensive (especially when, as here, the premiums and benefits are relatively small); it also would result in intolerable delay in finalizing the loan transaction.

period,[5] and if the cause of death appears to be related to one of the conditions listed on the Health Statement, Union Security will investigate to determine whether the Health Statement contained material inaccuracies. App., *infra,* 19a; R. 306-308, 332-333. If it learns that the death was caused by a pre-existing condition not disclosed on the Health Statement, Union Security denies the claim. R. 310, 312. If the cause of death is unrelated to any of the conditions listed on the Health Statement or if the death occurs outside of the one-year contestability period, Union Security pays the claim without further inquiry. R. 307, 349, 352.

The denial of a claim because of an undisclosed pre-existing condition is an exceedingly rare occurrence. In 1991, for example, Union Security received 134 claims on credit life coverage sold by First Alabama and denied only the one involved in this case. App., *infra,* 5a; R. 998-1000. In 1992, it received 119 claims on coverage sold through First Alabama and paid all but one, which was a suicide excludible under the insurance contract. App., *infra,* 5a; R. 1000, 1003. In 1993, it received 113 claims on coverage sold by First Alabama and paid all but four, two of which were suicides. App., *infra,* 5a; R. 1003. Union Security's nationwide statistics are similar. In 1992, it received a total of 7108 claims and paid all but 91, 36 of which were suicides. R. 1014, 1024-1026. In 1993, it received 6998 claims and paid all but 89, 41 of which were suicides. R. 1025-1026. In other words, when suicides are excluded, Union Security's denial rate has been less than 1%. App., *infra,* 5a.

2. *Coleman Crocker's Pre-Existing Medical Condition and the Crockers' Knowledge of the Effect of that Condition on his Insurability.* Plaintiff Evelyn Crocker is the widow of Coleman Crocker. Mr. Crocker was a smoker (R. 667) with a history of heart disease. See generally App., *infra,* 19a; R. 352, 605-606.

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[5] A contestability period is the amount of time during which an insurance company may contest the validity of the insurance contract because of misstatements on the application. If a policy has a one-year contestability period and the insured lives for more than a year after coverage commences, the coverage becomes incontestable without regard to whether the application contained any material misstatements.

Specifically, in 1984 he was hospitalized and ultimately underwent a by-pass operation. R. 564-565. Then in 1988, he had to be carried by ambulance to the Mobile Infirmary, where he underwent an emergency balloon angioplasty. R. 568-569, 593-594. In March 1989, he again had to be transported by ambulance to the Mobile Infirmary, where he had an angiogram performed. R. 595. Throughout this period, Mr. Crocker was on a variety of heart medications (R. 594-596) and was attended by at least half a dozen doctors (R. 600).

In 1988, the Crockers learned that Mr. Crocker's medical condition would adversely affect his ability to obtain affordable insurance. At that time, their regular insurance agent, Larry Adams, discussed with them the possibility of changing policies. During that conversation, Adams asked Mr. Crocker various questions about his health. When he learned that Mr. Crocker was a smoker and suffered from heart disease, Adams advised Mr. Crocker against attempting to change policies. He told the Crockers that, as a result of the health problems, the premiums on any new policy would be too high. R. 662-663, 667-668.

3. *The Crockers' Purchase of Credit Life Insurance from Union Security.* In October 1990, two years after learning about the difficulty Mr. Crocker would have in obtaining affordable insurance, the Crockers approached Samuel Taylor, the branch manager of First Alabama—Choctaw's Gilbertown branch, for purposes of obtaining a consolidation loan. App., *infra,* 19a; R. 536-537, 571. In conjunction with the loan, the Crockers decided to purchase credit life insurance. App., *infra,* 19a.

Because the Crockers' loan was for more than $10,000, they each were required to execute a Health Statement as a prerequisite to obtaining credit life insurance through Union Security. Taylor accordingly filled out a Health Statement for each of the Crockers, checking each of the nine "NO" boxes to indicate that neither of them suffered from any of the listed medical conditions. App., *infra,* 19a.[6] At the closing, Taylor explained to the Crockers the

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[6] There is a dispute of fact as to whether Taylor specifically asked the Crockers each of the health questions and then filled in the "NO" box for each question after receiving their negative responses. Compare R. 504-

nature of each of the documents they were signing, including the Health Statements. R. 509-510, 543, 575, 603-604. He did not rush them or otherwise prevent them from carefully reviewing the documents before they signed them. See R. 522, 542-543, 597-598, 610. Mr. Crocker then signed his Health Statement despite the fact that it falsely indicated that he had not suffered from heart disease during the preceding five years. R. 511, 599-600, 606. Mrs. Crocker saw her husband sign the document. R. 607.

Because the Crockers had signed the Health Statements indicating that neither of them suffered from a pre-existing condition, Taylor was authorized to issue each of them a certificate of insurance summarizing the terms of the First Alabama group policy (R. 349, 442-443, 447) and to add the one-time $1,659.61 premium to their indebtedness (R. 329, 512). Accordingly, as of the time of the closing, the total debt (including interest over the life of the loan) was $21,873. C. 298.[7]

506, 522 (Taylor's testimony that he asked the Crockers the health questions and was told that they had none of the nine conditions) with R. 576-578 (Mrs. Crocker's testimony that Taylor never asked her husband the health questions). There also is a dispute of fact as to whether Taylor actually knew that Mr. Crocker indeed had suffered from heart disease. Compare R. 523, 544-545, 555 (Taylor's testimony that, at the time he filled out the form, he had no recollection of Crocker having been ill in the past) with R. 589-592, 615 (Mrs. Crocker's testimony that Taylor knew that Mr. Crocker had suffered from heart disease) and R. 637-638, 640-641 (bank teller's testimony that she overheard Taylor discussing Mr. Crocker's heart condition with Mrs. Crocker two years prior to filling out the Health Statements). Significantly, however, there is no evidence either that Union Security had authorized Taylor to fill out the Health Statement without asking the health questions or that it had authorized him to fill out Health Statements inaccurately — actions that might be helpful to the bank but that indisputably were against Union Security's interest.

[7] The Alabama Supreme Court's opinion states that Taylor received a commission from Union Security for the sale of credit life insurance to the Crockers and others. See App., *infra*, 2a. The record flatly contradicts that statement. Although Taylor received the modest sum of between $600 and $800 annually for selling credit life insurance (see R. 540), the uncontradicted evidence was that those amounts were paid by ***First***

4. *Mr. Crocker's Death and the Denial of Mrs. Crocker's Claim*. On August 28, 1991, approximately nine months after the closing, Mr. Crocker died of a heart attack. The official cause of death was "acute myocardial infarction/coronary artery disease." C. 307. Mrs. Crocker notified the bank, which submitted a claim to Union Security for the $14,563 remaining on the loan. App., *infra,* 19a; C. 306. As part of the process of making a claim, First Alabama—Choctaw provided Union Security with the death certificate. App., *infra,* 19a; R. 513-514, 548. Because Mr. Crocker had died within the policy's one-year contestability period and because the cause of death was related to one of the conditions listed on the Health Statement, Union Security investigated the claim. R. 351. Its designated representative contacted the office of the doctor who signed the death certificate and learned that Mr. Crocker had been suffering from heart disease at the time he signed his Health Statement. R. 321, 351-352; C. 304. On the basis of that information, Union Security denied Mrs. Crocker's claim and informed her that the portion of the premium attributable to Mr. Crocker would be refunded. App., *infra,* 19a; C. 318. Union Security instructed First Alabama—Choctaw to make the refund. R. 346-347, 739. Unfortunately, for unknown reasons, First Alabama—Choctaw did not immediately make the refund as instructed. R. 739. After suit was filed and the president of First Alabama—Choctaw learned that the refund had not been made, the bank credited the premium amount plus interest against the loan balance. R. 739-740, 742-746.

5. *Prior Proceedings*. Following Mr. Crocker's death, Mrs. Crocker ceased making payments on the loan. After she was four months in arrears, First Alabama—Choctaw sent her a collection notice. R. 744. Mrs. Crocker then recommenced making payments and continued doing so until June 1993 (18 months later), when one of her lawyers began making the payments for her. R. 631-632,

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Alabama pursuant to its "Credit Life Incentive Plan" and subject to a maximum set by Alabama banking regulations (see C. 328-330). After all, it was not Union Security that was the principal beneficiary of the purchase of credit insurance, but rather First Alabama, whose loans would be fully protected and which, in addition, received no less than half of the premium (see R. 354-355, 722-723; Supp. C. 5).

886. Meanwhile, Mrs. Crocker filed suit in Choctaw County against First Alabama—Choctaw and Union Security. Her amended complaint alleged that Taylor, as agent for both First Alabama—Choctaw and Union Security, had misrepresented to the Crockers that, in the event Mr. Crocker died, the credit life insurance would pay off the balance of the loan. The amended complaint also alleged that Taylor "concealed" from the Crockers the fact that he was disclosing inaccurate information on the Health Statement, that they had to be in good health to get the insurance, and that, if Mr. Crocker were to die of heart problems, coverage would be denied. C. 180.

The case went to trial on February 14, 1994. At trial, there was no evidence that Union Security had authorized Taylor or any other agent to fill out health statements inaccurately. Nor was there any evidence that Union Security had instructed Taylor or any other agent to "conceal[]" the fact that inaccuracies on a health statement could result in denial of a claim. Instead, the evidence of wrongdoing focused exclusively on Taylor (and to a limited extent on First Alabama—Choctaw).[8] Yet plaintiff was unable to adduce any evidence to suggest that Taylor (or any other Union Security agent for that matter) had ever before or since committed a fraud in the sale of credit life insurance.

Hamstrung by the absence of any evidence of direct wrongdoing on the part of Union Security, Mrs. Crocker's counsel assailed Union Security's practice of "post-claim underwriting" (R. 829-832, 889, 891-894), which was not the basis of any of her claims (and could not have been, given that this practice was

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[8] Even as to Taylor, the evidence of culpable misconduct was thin at best. There was, for example, no evidence that Taylor made any effort to conceal from the Crockers the answers he had placed on Mr. Crocker's Health Statement. To the contrary, Mrs. Crocker admitted at trial that Taylor showed her the one-page Health Statement but claimed that she simply failed to review it either at the loan closing or later when she received a copy in the mail. R. 544, 607, 632-633.

permitted by Alabama's insurance statute and regulations).[9] Moreover, despite the absence of evidence of similar acts of misconduct, and in the face of the undisputed evidence that Union Security pays over 99% of the claims submitted to it, Mrs. Crocker's counsel was permitted (over Union Security's objection (see R. 361-363)) to submit evidence of Union Security's sizeable aggregate premiums (over the entirety of the contract with First

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[9] "Post-claim underwriting" refers to the practice of accepting representations in applications at face value, and investigating their accuracy only in the event a claim is made within the policy's contestability period. Alabama law expressly states that insurers may deny coverage because of misstatements or omissions in the application if (1) the misstatements or omissions are "[f]raudulent" or (2) the misstatements or omissions are "[m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer" or (3) the insurer would not have issued the policy had the application been accurate. Ala. Code § 27-14-7. Courts construing this provision have concluded that, with limited exceptions, it permits post-claim underwriting. See, *e.g.*, *Stephens v. Guardian Life Ins. Co.*, 742 F.2d 1329, 1334 (11th Cir. 1984) ("[i]nsurers are not required to investigate when the information furnished by the insured reveals nothing out of the ordinary"). The regulation that makes credit life insurance coverage incontestable after one year (Ala. Ins. Reg. No. 28, § VI(J)(2)) is confirmation that, during the first year of a policy, there is nothing unlawful about denying a claim based on misstatements in the application that were not discovered until the claim was made. Alabama is hardly unique in this regard. See, *e.g.*, *Hays v. Jackson Nat'l Life Ins. Co.*, 105 F.3d 583, 590-591 (10th Cir. 1997) (holding that post-claim underwriting is not tortious under Oklahoma law); *Massachusetts Mut. Life Ins. Co. v. Manzo*, 584 A.2d 190, 193-194 (N.J. 1991) (in New Jersey, if health statement contains material misrepresentations, insurer may rescind policy any time during contestability period). While a later decision of the Alabama Supreme Court has cast doubt upon the continuing validity of Alabama's statutory and regulatory authorization of post-claim underwriting (see pages 12-13, *infra*), that decision was not handed down until long after the denial of respondent's claim.

Alabama) and low loss ratios for credit life insurance sold by First Alabama employees. R. 365-371; C. 313-316.[10]

During summations, Mrs. Crocker's attorneys focused the jury on these irrelevant, yet highly inflammatory facts. In particular, they stressed at length the total amount of premiums generated from the sale of credit life insurance over the course of Union Security's contract with First Alabama, as if the sale of that product was itself the tort for which punishment was being sought. See R. 894-896.

Following summations, the case was submitted to the jury against both defendants. After deliberating a mere 36 minutes (see R. 927-928), the jury returned a general verdict holding the defendants jointly and severally liable in the amount of $5 million. R. 929; C. 735.

After both defendants moved for judgment n.o.v., new trial, and remittitur, the trial court sustained the jury's finding of liability and rejected the defendants' various grounds for a new trial. Finding the $5 million verdict excessive, however, the court indicated that it would grant a new trial unless Mrs. Crocker agreed to a remittitur to $3 million. See App., *infra,* 38a.

In reviewing the size of the award, the trial court noted that "[t]his case involved misrepresentations made ***by the agent*** for defendants as well as concealment ***by the agent*** of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance." App., *infra,* 32a (emphasis added). In other words, the defendants were held liable under a theory of vicarious liability; there were ***no*** direct actions on the part of Union Security that were the basis for liability. The court further observed:

> This appears to be an isolated incident insofar as both defendants are concerned in failing or refusing to pay a credit life insurance claim premised upon the fraud of their agent. ***There is no evidence either defendant engaged in similar misrepresentations or***

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[10] A loss ratio is the percentage of annual earned premiums paid out in claims. R. 366. It does not take into account either the costs of selling and servicing the insurance policies or premium taxes and so is ***not*** a measure of the profitability of that line of insurance.

> ***concealments/suppressions in their dealings with other credit life insureds.*** In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants. This factor mitigates against the award of very significant punitive damages being assessed against the defendants.

Id. at 33a (emphasis added). See also *id.* at 35a ("[T]his Court has found no repeated wrong-doing by either defendant. This was an isolated incident."). The court also noted that, even before Mr. Crocker's death (and hence before it had any reason to believe that his Health Statement contained a material misstatement), Union Security had revised the Health Statement to include the specific admonition that "Untruthful answers may result in denial of claims." *Id.* at 36a (quoting revised Health Statement).

Despite these various mitigating factors, the trial court concluded that a punitive award of $3 million was not excessive under the circumstances. The court based that conclusion principally upon its findings that (1) Mrs. Crocker had suffered "grievous" harm because "all the expectations for which [she] and her deceased husband had bargained and paid for, totally failed" and (2) in 1991 Union Security realized a net gain of $1.29 million from the sale of credit life insurance ***nationwide***. *Id.* at 33a, 34a.[11]

After both defendants filed notices of appeal, First Alabama—Choctaw entered into a pro tanto settlement with Mrs. Crocker, pursuant to which it paid her $1 million. App., *infra,* 18a. Union Security then successfully moved for a remand to the trial court for purposes of determining whether a punishment of $2 million (*i.e.*, the remainder of the judgment) was excessive in relation to Union Security's conduct, particularly in view of the lesser amount paid by the more culpable co-defendant. The trial court subsequently issued a short order holding that $2 million was not excessive as to Union Security. App., *infra,* 40a-43a.

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[11] Needless to say, the latter ground is inconsistent with this Court's holding that states may not punish defendants for conduct occurring in other states that has not been shown to be unlawful in those other states. *BMW,* 116 S. Ct. at 1595-1598.

A five member panel of the Alabama Supreme Court then affirmed in all respects. The court rejected Union Security's argument that the evidence did not support the finding of liability for the underlying tort, stating that "the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." App., *infra,* 21a.

The court also upheld the $2 million punishment against Union Security, stating that it "does not exceed the amount necessary to promote society's goals of punishment and deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies." App., *infra,* 26a. In concluding that Union Security's conduct needed to be "exorcise[d]," the Alabama Supreme Court relied entirely upon observations it had made in *Huff v. United Ins. Co. of America,* 674 So. 2d 21 (Ala. 1995), which was decided more than 3½ years ***after*** Union Security had denied Mrs. Crocker's claim. Quoting from *Huff* — and with apparent indifference to frauds perpetrated on insurance companies — the court stated:

> ***As the law in Alabama currently stands,*** an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement could prevent situations like the one in this case.

App., *infra,* 26a-27a (quoting *Huff,* 674 So. 2d at 23) (emphasis added).[12]

After the Alabama Supreme Court denied rehearing, Union Security sought review in this Court, contending that the $2 million punitive judgment against it was grossly excessive in violation of the Due Process Clause. This Court held the petition until it decided *BMW*; it then granted the petition, vacated the Alabama Supreme Court's judgment, and remanded the case for further consideration in light of *BMW*. 116 S. Ct. 1872 (1996).

On remand, the Alabama Supreme Court cut the judgment in half, leaving a still breathtaking $1 million award. Although purporting to apply *BMW,* the court in fact eviscerated it.

With regard to *BMW*'s reprehensibility guidepost, the court acknowledged that, as far as Union Security was concerned, the wrongdoing for which it was being held vicariously liable was "an isolated incident, rather than the result of a standard operating procedure." App., *infra,* 5a. See also *id*. at 6a (observing that the misconduct for which Union Security was held liable was "an aberration for the company"). It nevertheless concluded that Union Security's conduct was "highly reprehensible." *Ibid*. In support of that conclusion, it cited only the bare claim (inaccurate as it turns out (see note 18, *infra*)) that Union Security's denial of coverage

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[12] In so stating, the Alabama Supreme Court overlooked the facts that, under Alabama law, ordinary life insurance policies are incontestable after a maximum of two years (see Ala. Code § 27-15-4), and that credit life insurance polices are incontestable after only one year (see Ala. Ins. Reg. No. 28, § VI(J)(2)). When a policy contains a short contestability period, the "benefits" of taking the policyholder at his or her word do not "lie solely in favor of the insurance company and its agent." To the contrary, dishonest policyholders have a tremendous incentive to lie on their health statements, knowing that their fraud will be rewarded if they can survive the short contestability period.

resulted in Mrs. Crocker being threatened by ***the bank*** with foreclosure. App., *infra*, 5a.[13]

As for the second *BMW* guidepost, the court assumed — without pointing to an iota of evidence (as none exists) — that Mrs. Crocker suffered an "unknowable," yet significant, amount of mental anguish and, on the basis of that assumption, concluded that the ratio of punitive damages to compensatory damages was not excessive. App., *infra*, 6a-7a.[14]

More remarkably, the Alabama Supreme Court refused outright to apply the third of the *BMW* guideposts, which calls for a comparison of the punitive damages with the legislatively established fine for comparable misconduct — in this case, the $1,000 fine for violations of Alabama's insurance statute. The court defiantly stated: "the maximum statutory sanction against insurance fraud in this state is meager and, because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award." App., *infra*, 7a-8a (internal quotation marks and brackets omitted).

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[13] Other than a bald statement that "Union Security issued insurance to Mr. Crocker without any meaningful knowledge of his medical history" (App., *infra*, 5a), the court apparently abandoned its plainly unconstitutional effort to justify the punishment on the basis of its denunciation in *Huff* of conduct that was unambiguously permitted by Alabama law at the time that Union Security extended coverage to the Crockers.

[14] In a concurrence issued at the rehearing stage, one Justice stated that he presumed that the jury awarded the maximum permissible amount of compensatory damages, which he hypothesized to be $250,000, of which $16,222.61 constituted economic damages and the balance constituted damages for emotional distress. App., *infra*, 45a-46a (Houston, J., concurring specially). Like the majority, he pointed to no evidence in the record to support a conclusion that Mrs. Crocker could have suffered emotional distress of that magnitude. Nor did he attempt to justify the assumption that the jury awarded the hypothetical maximum permissible amount of mental anguish damages despite the absence of any evidence of emotional distress.

Finally, concluding that the three *BMW* guideposts are not exclusive, the Alabama Supreme Court reviewed additional factors that have been identified under state law. Most significantly, it noted that the punitive award "exceeds" the $67,019 in profit that Union Security earned from selling credit life insurance through First Alabama in 1991. App., *infra,* 8a. In so noting, the court gave no attention to the fact that Taylor's tort was an isolated incident and that the $67,000 figure therefore represents not ill-gotten gains but rather legitimate profits from thousands of perfectly ***lawful*** transactions. Nor did the court make any effort to explain how a punishment of 11 to 15 times that lawful annual profit could possibly be justified under the facts of this case.

Chief Justice Hooper and Justices Maddox and See dissented. Although expressing a preference for remanding the case (App., *infra,* 10a), Chief Justice Hooper concluded that the $1 million remitted award remained excessive. The Chief Justice pointed out that "the primary tortfeasor was First Alabama Bank" and stated that he found "no evidence of reprehensible conduct on the part of Union Security that would justify a substantial punitive damages award against it." *Ibid.* Unlike the majority, he explained his conclusions, rather than simply making unsupported assertions:

> Sammy Taylor committed the wrongful conduct in this case. Taylor was the branch manager of the Gilbertown branch of First Alabama. ***Because there has been no finding that Union Security had knowledge of any fraudulent conduct on the part of its agent, Union Security's liability is entirely vicarious.***
>
> * * * * *
>
> There is a noticeable lack of evidence from which one could conclude that Union Security supported Taylor's conduct, or, for that matter, that Union Security had any knowledge at all of Taylor's deception or of any previous misconduct by Taylor as an agent.

Id. at 11a (emphasis added).

Chief Justice Hooper also criticized the majority's refusal to apply the third *BMW* guidepost:

> The most important consideration behind the analysis called for by this "guidepost" is the notice available to this defendant of what penalty might be imposed upon it for deceitful conduct. The fact that the penalty is meager argues in favor of a reduction in the punitive award. If the penalty is meager, then the defendant received less notice that it would be subject to such an extraordinary punitive damages award. On the basis of the *BMW* analysis alone, I would substantially reduce the damages award in this case.

Id. at 12a.

The Chief Justice concluded that "***this Court has once again ignored the United States Supreme Court's admonition*** that grossly excessive punitive damage awards, such as that awarded in this case, violate the Due Process Clause of the Fourteenth Amendment." *Ibid.* (emphasis added).

Justice See, joined by Justice Maddox, sounded a similar theme. Although, like the Chief Justice, they believed that the case should have been remanded for a determination of what portion of the judgment was punitive, they too challenged the majority's conclusory assertion of reprehensibility, stating:

> The majority relies on the telephone call to Mrs. Crocker five days before Christmas informing her of a pending foreclosure on her home mortgage. However, it was not the defendant in this appeal, Union Security, that made the call. It was First Alabama. ***And when First Alabama made the call, it was acting as a foreclosing creditor, not as the sales agent for Union Security.***

Id. at 14a (emphasis added).

Justices See and Maddox, like Chief Justice Hooper, concluded with a sharply critical assessment of the majority's ruling:

> This Court's punitive damages jurisprudence has failed to produce predictable results. The fact that the majority inexplicably reduces the award here to $1 million makes the review process no less arbitrary.

> The standards this Court established in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), are designed to prevent arbitrary punitive damages awards. As Justice Breyer observed in his concurrence in *BMW*, ___ U.S. ___, 116 S. Ct. at 1609, however, this Court's application of those standards "violate[d] the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides." That the misapplication of the three guideposts produces arbitrary results is illustrated by the majority's holding in the three cases decided since *BMW*:

Case	Punitive Award	Compensatory Award	Ratio	Reprehensibility
BMW II	$50,000	$4,000	13:1	Low
Johnson II	$3,000,000	$250,000	12:1	High
Crocker II	$985,437	$14,563	68:1	Low

Id. at 15a-16a (footnotes omitted).

Union Security filed a timely application for rehearing, which the Alabama Supreme Court denied by the same 6-3 vote. After Union Security unsuccessfully moved for a stay in the Alabama Supreme Court, Justice Kennedy granted one pending the timely filing and disposition of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

We recognize that this Court does not sit to correct errors in individual cases, including garden-variety misapplications of *BMW*'s constraints on excessive punitive damages. But while this case does reflect an egregious misapplication of *BMW*, it presents a more imperative need for this Court's attention, *viz.*, the importance of ensuring that this Court's directive to reconsider a remanded case is not flagrantly flouted.[15] The mandate to curb Alabama's

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[15] This Court often has either summarily reversed or granted plenary review when it has concluded that a lower court has not faithfully applied a controlling decision in a case that had been remanded for further consideration in light of that decision. See, *e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1654-1656 (1996); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 91-94 (1993); *Powell v. Texas*, 492 U.S. 680 (1989); *Immigration & Naturalization Serv. v. Pangilian*, 486 U.S. 875,

epidemic of grossly excessive punitive exactions applied to more than the *BMW* case itself, yet the court below has, all too often since *BMW*, chosen to give short shrift to the Court's guidelines for conducting the constitutional excessiveness inquiry. Here this phenomenon is especially pronounced: the reprehensibility factor is handled by the mere incantation that the conduct was "highly reprehensible" without allusion to a single wrongful act that can be laid at Union Security's door;[16] the reasonable relationship requirement is evaded by reference to supposed emotional distress wholly invented by the Alabama Supreme Court; and the comparison to fines and civil penalties is dispensed with on the remarkable ground that such an inquiry would not support the result the court is predisposed to reach. With all due respect, this is not a reasonable effort to comply with this Court's mandate in vacating and remanding the earlier decision in this case.

As we now show, the Alabama Supreme Court has not heeded this Court's mandate that it apply the factors relevant to the excessiveness inquiry in a way that will "significantly constrain" unjustifiably large punitive awards and reduce the "risk of outcomes so arbitrary that they become difficult to square with the

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881-882 (1988); *United States v. Dunn*, 480 U.S. 294, 299-300 (1987).

[16] In this regard, the present case is hardly an isolated incident. With the exception of *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524 (Ala. 1997) — which truly did involve substantial record evidence of highly egregious misconduct — the Alabama Supreme Court in each of the other remanded cases paid no more than lip service to the reprehensibility guidepost, committing the very sin for which it had been criticized by both the majority and the concurrence in *BMW*. *See* 166 S. Ct. at 1601; *id.* at 1606 (Breyer, J., concurring). Specifically, in *American Pioneer Life Ins. Co. v. Williamson*, 1997 WL 545880 (Ala. Sept. 5, 1997) ($2 million punishment reduced to $750,000), the court did not even explain why the defendant's conduct constituted a tort (as opposed to merely a breach of contract), much less why it was so reprehensible as to warrant a $750,000 punishment. And in *Ford Motor Co. v. Sperau*, 1997 WL 545878 (Ala. Sept. 5, 1997) ($6 million punishment reduced to $1.8 million), the court indicated that Ford's conduct was benignly motivated but nonetheless inexplicably found it reprehensible enough to warrant a penalty that is not materially less than the one found grossly excessive in *BMW*.

Constitution's assurance, to every citizen, of the law's protection" (116 S. Ct. at 1609 (Breyer, J., concurring)). The Alabama Supreme Court's open defiance of *BMW* calls for either summary reversal or plenary review.

1. *Reprehensibility*. As in *American Pioneer* and *Ford*, the Alabama Supreme Court gave lip service to the reprehensibility guidepost while in practical effect "depriv[ing] the concept of its constraining power to protect against" unconstitutionally excessive punishments (*BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring)). Although characterizing Union Security's conduct as "highly reprehensible," the court made no effort to explain why that was so. Indeed, to the extent this Court's discussion of the reprehensibility guidepost in *BMW* was meant to serve a didactic purpose, the lesson was entirely lost on the Alabama Supreme Court.

As in *BMW*, "none of the aggravating factors associated with particularly reprehensible conduct is present" in this case. 116 S. Ct. at 1599. To begin with, here, as in *BMW*, Union Security's tort — if there was a tort — was "purely economic in nature." *Ibid.* "[Union Security's] conduct evinced no indifference to or reckless disregard for the health and safety of others." *Ibid.* Moreover, as in *BMW*, the injuries in this case were not inflicted "intentionally through affirmative acts of misconduct" on the part of the defendant. *Ibid.*

Like *BMW*, Union Security is not a "recidivist": there is no evidence that it "has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." 116 S. Ct. at 1599. To the contrary, the trial court expressly found that Taylor's tort was "an isolated incident." C. 1916, 1918. Even the Alabama Supreme Court was forced to agree on this point. App., *infra*, 5a, 6a, 9a.

Finally, "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." 116 S. Ct. at 1601. In other words, like *BMW* and unlike *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), there is not the slightest basis here for concluding that the punishable conduct involved "intentional malice." 116 S. Ct. at 1599.

Indeed, the Alabama Supreme Court's opinion refers to no evidence from which it could fairly be concluded that Union Security did anything wrong at all, let alone something so reprehensible as to warrant a fine in the range of $750,000 to $1,000,000. In particular, there was no evidence in this case that Union Security authorized Taylor or any other agent to falsify Health Statements (conduct that clearly would have been ***detrimental*** to Union Security). Nor was there evidence that it instructed Taylor or any other agent to suppress the (seemingly obvious) fact that, if the insured signs a Health Statement that fails to disclose a pre-existing condition, his or her claim might be denied.[17]

If the focus is placed where it belongs — on Union Security's vicarious liability for Taylor's one-time failure to disclose the consequences of making misstatements on a Health Statement — it becomes manifest that the conduct at issue here falls even lower on the reprehensibility spectrum than the conduct at issue in *BMW*. That case involved a corporate policy that allegedly injured 14 Alabama car purchasers. Here, by contrast, First Alabama—Choctaw and its employee Taylor disregarded Union Security's policy and acted in a manner adverse to Union Security's interests (the only potential beneficiaries being the bank and, possibly, the Crockers themselves). Moreover, the misconduct was concededly "an isolated incident." App., *infra*, 5a, 6a, 9a. And here, unlike in *BMW*, liability is entirely vicarious. See *TXO*, 509 U.S. at 468 (Kennedy, J., concurring) (drawing distinction between cases involving malice and those involving "negligence, strict liability, or *respondeat superior*").

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[17] To the extent a fraud was committed at all in this case, Union Security was the ***victim***, not the perpetrator. Union Security has nothing to gain, and much to lose, when a Health Statement fails to disclose a pre-existing medical condition. Whenever a claim is made outside of the one-year contestability period, Union Security is obligated to pay the claim regardless of whether the cause of death was related to an undisclosed pre-existing condition and even if it has been the victim of a deliberate fraud. And, if the claim is made within the contestability period and denied because of a false or inaccurate Health Statement, the premium is refunded.

The only basis given by the Alabama Supreme Court for its conclusion that Union Security's conduct was "highly reprehensible" was the mistaken supposition that Mrs. Crocker experienced a threat of foreclosure after Union Security denied coverage.[18] But even were the facts as described, no fault could be laid at Union Security's door. While a refusal to pay insurance benefits may result in financial hardship, Union Security was not held liable for a bad faith denial of coverage. Indeed, there can be no question that its denial of coverage was entirely proper. See note 9, *supra*. Rather, the "tort" for which Union Security was held liable was Taylor's failure to make clear to the Crockers that coverage could be denied if Mr. Crocker were to die during the one-year contestability period and if Union Security were to learn that the

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[18] The Alabama Supreme Court's opinion relies heavily on the supposition that Mrs. Crocker could not make her loan payments following her husband's death and that First Alabama—Choctaw intended to foreclose on her home and evict her five dates before Christmas. See App., *infra*, 3a, 5a. The record is clear, however, that the bank's December 11, 1991 letter to Mrs. Crocker (for which Union Security had no responsibility whatever, either direct or vicarious) states only that the bank would send the file to its lawyers if she did not pay the arrearage by December 20. R. 518-519. Had it intended to initiate foreclosure proceedings, the bank would have been required under Alabama law to first publish a foreclosure notice for three consecutive weeks (see Ala. Code §§ 35-10-13, 35-10-16) — something it never did. There was thus not the slightest possibility of a foreclosure on December 20 or any time soon thereafter. Indeed, when plaintiff's counsel mischaracterized the letter as stating that Mrs. Crocker would be "kicked out of [her] house," the trial court sustained Union Security's objection and instructed the jury to disregard the question. R. 584-585.

Moreover, Mrs. Crocker was not unable to make the payments that were due on her loan. To the contrary, it was not only undisputed but expressly acknowledged by her counsel during his summation that Mrs. Crocker successfully made her loan payments for a full year and a half, from December 1991 through June 1993 (at which time counsel began making the payments for her). R. 886; see also R. 631-632. Thus, the Alabama Supreme Court's conclusion that the conduct of Taylor and the bank had placed a helpless widow on the verge of losing her home days before Christmas is a complete fabrication.

answers on the Health Statement were inaccurate. See App., *infra,* 21a. To hold that Union Security was a "highly reprehensible" wrongdoer merely because a local bank officer, ***wearing solely his bank officer hat***, attempted to collect on an overdue loan is to empty the reprehensibility guidepost of any meaningful content.

2. *Ratio.* The Alabama Supreme Court's treatment of the ratio guidepost in this case is hardly more faithful to ***BMW*** than its "application" of the reprehensibility criterion. Recognizing that Mrs. Crocker suffered only modest economic injury and that the ratio of the punitive damages to that injury was accordingly indefensibly large, the court contrived a way to nullify the ratio guidepost by speculating — without a whit of record support — that Mrs. Crocker experienced significant emotional distress. App., *infra,* 6a-7a. Justice Houston went so far as to posit that the jury would have been justified in awarding as much as $250,000 for Mrs. Crocker's hypothetical anguish. App., *infra,* 45a-46a. Contrary to these after-the-fact efforts to justify the award, however, the record contains ***no evidence whatever*** of any emotional distress. The only effort made by plaintiff's counsel to adduce evidence of emotional distress was the following question posed to Mrs. Crocker regarding her reaction to the ***bank's*** letter informing her that it would send the file to its lawyers if she did not resolve the arrearage: "When you got that letter on December the 11th or sometime afterwards, were you — were you upset?" R. 587. Although Union Security had no responsibility for the contents of the letter, it objected on the ground that the question called for a self-serving declaration about the witness's own mental processes. R. 587-588. The court sustained the objection (R. 588), and there were no further efforts to establish emotional distress.

In particular, there was no evidence that Mrs. Crocker consulted a doctor, psychologist, or therapist; no evidence that she was prescribed or took any medication; and no evidence that she suffered anxiety attacks, depression, withdrawal, sleeplessness, loss of appetite, or any other manifestation of mental anguish or

emotional distress.[19] Consistent with the absence of evidence of significant mental distress, plaintiff's counsel barely mentioned compensatory damages during summations, focusing instead squarely on their request for a large punitive award. See R. 833-834, 894-902. Indeed, counsel specifically suggested a $10 million punishment to "send a message" "straight to Atlanta," where Union Security is located, and from there "straight to Europe," where its ultimate parent company is located. R. 901.

There is thus no record basis for assuming that Mrs. Crocker suffered any significant amount of mental anguish that could serve to reduce the ratio of punitive damages to actual damages in a material way. The Alabama Supreme Court's assertion to the contrary — unsupported as it is by any citation to facts in the record — is entitled to no weight. As four Members of this Court have recognized, a verdict may not be justified on the basis of facts not before the jury. See *TXO*, 509 U.S. at 468 (Kennedy, J., concurring); *id.* at 484-489 (O'Connor, J., dissenting, joined by White and Souter, J.J.).

Even indulging the unfounded speculation that Mrs. Crocker experienced significant mental anguish, however, the Alabama Supreme Court was quite mistaken in assuming that that disposes of the ratio inquiry. This Court made clear in *BMW* that the

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[19] The absence of ***any*** evidence of mental anguish distinguishes this case from *First Commercial Bank v. Spivey*, 694 So. 2d 1316 (Ala. 1997), which was relied upon in the Alabama Supreme Court's opinion (App., *infra*, 7a) and Justice Houston's concurrence in the denial of rehearing (App., *infra*, 46a). In *Spivey*, the plaintiff testified that she and her husband lost their equity in two homes and 21 acres of land, that her husband's business had to declare bankruptcy, that she and her husband had to declare personal bankruptcy, that she was "devastat[ed]" because they had "lost everything" they had obtained in 16 years of marriage, that they could not get credit any longer, that she was "humiliated and embarrassed" as a result of the couple's financial difficulties, that the financial problems caused them to experience marital difficulties, and "that her life had been turned upside down" by the defendant's fraudulent conduct. 694 So. 2d at 1320, 1325. Because there was no equivalent evidence here, *Spivey* lends no support to the court's conclusion that Mrs. Crocker suffered a significant amount of damages for mental anguish.

constitutionally permissible ratio will vary from case to case. 116 S. Ct. at 1602. Just as a large ratio may not always be indicative of an unconstitutionally excessive award, neither would a lower ratio necessarily mean that the amount of the penalty is permissible.

Moreover, because of the very real possibility that damages for mental anguish may be inflated, any evaluation of the relationship between punitive damages and actual injury should encompass a comparison of the punitive damages to the "hard" economic damages.[20] Indeed, this Court implicitly recognized as much in an earlier general verdict case arising out of Alabama. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (considering both the ratio of punitive damages to compensatory damages and the ratio of punitive damages to the plaintiff's out-of-pocket loss).

Here, the Alabama Supreme Court found that the economic injury suffered by Mrs. Crocker was $16,222.61 — the $14,563 balance on the Crockers' loan plus the $1,659.61 premium paid by the Crockers for their coverage.[21] If this amount is compared to the rest of the $1 million remitted judgment, the ratio is a massive ***60:1***.[22] And even if Justice Houston's hypothesis of $250,000 in

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[20] The Utah Supreme Court has recognized this principle as a matter of state common law. See *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 811 n.29 (Utah 1991) ("Where actual damages are largely 'soft,' this Court has been reluctant to uphold punitive damage awards of a ratio that might survive scrutiny if the actual damages involved were 'hard.'").

[21] Justice See's dissent utilized only the $14,563 figure (see App., *infra*, 16a n.10), pointing out that payment of the premium was a precondition to obtaining the insurance and hence was not a loss to the Crockers.

[22] This is the most appropriate comparison, given the absence of ***any*** evidence of mental anguish. Moreover, even if the general verdict could be understood to encompass a significant amount of damages for mental anguish, from Union Security's perspective, such damages — because they far outstrip any "ill-gotten gain" — have the effect of punitive damages. See generally *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory

actual injury is credited, the ratio of punitive damages to economic harm ($750,000/$16,222.61) would still be a very high ***46:1***.

Justices Breyer, O'Connor and Souter concluded in ***BMW*** that "[t]o find a 'reasonable relationship' between purely economic harm totaling $56,000, ***without significant evidence of future repetition,*** and a punitive award of $2 million is to empty the 'reasonable relationship' test of meaningful content." 116 S. Ct. at 1606 (Breyer, J., concurring) (emphasis added). See also *id.* at 1608 ("A punitive damages award of $2 million for intentional misrepresentation causing $56,000 of harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times."). That observation applies with equal force to the even higher range of ratios involved here. Manifestly, this case is evidence that the Alabama Supreme Court has continued emptying the reasonable relationship standard of meaningful content and again needs to be reminded that ratios of this startling magnitude, if ever permissible, should be reserved for "extraordinary" cases, not cases of pure vicarious liability for an isolated instance of fraud that had every likelihood of benefitting the plaintiff and harming the defendant.

3. *Legislatively Established Fines for Comparable Misconduct.* The Alabama Supreme Court flatly refused to apply the third *BMW* guidepost, justifying its approach on the ground that "the maximum sanction against insurance fraud in this state [$1,000] is meager" and hence ill-suited for comparison with "any meaningful punitive damages award." App., *infra,* 7a-8a (internal quotation marks omitted).[23] The court did not even attempt to explain how its refusal to consider the applicable Insurance Code fine could be squared with this Court's comparison of the $2 million punishment in *BMW* with the $2,000 maximum fine available under Alabama's Deceptive Trade Practices Act. Its action here, moreover, was not an isolated aberration; it took the same stance in the *BMW* remand, in which it stubbornly refused to

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damages and attorney's fees already provide significant deterrence").

[23] The Alabama Supreme Court similarly refused to apply the third guidepost in *Life Ins. Co. of Georgia v. Johnson,* 701 So. 2d at 531.

consider the very DTPA fine found meaningful by this Court. See *BMW of North America, Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997).

Needless to say, the Alabama Supreme Court's cavalier rejection of the third *BMW* guidepost simply on the ground that it weighs against a large punishment is intolerable as a matter of both federalism and due process. This Court did not indicate that use of that guidepost is optional; instead, it stated that "a reviewing court engaged in determining whether an award is excessive ***should*** accord ***substantial deference*** to legislative judgments concerning appropriate sanctions for the conduct at issue." 116 S. Ct. at 1603 (emphasis added). Moreover, such an analysis is necessary to ascertain whether the defendant had fair notice that it could receive a punishment in the high six figures. *Ibid.* As Chief Justice Hooper put it in his dissent, "[t]he fact that the [applicable legislatively established] penalty is meager argues in favor of a reduction in the punitive award. If the penalty is meager, then the defendant received less notice that it could be subject to such an extraordinary punitive damages award." App., *infra,* 12a.

4. *Profit*. Concluding that the three *BMW* guideposts are not exclusive, the Alabama Supreme Court considered several other excessiveness factors that have been identified in prior Alabama cases, most significantly the "profit" from the alleged misconduct. App., *infra,* 8a-9a. The court stated that "[t]here was evidence that Union Security earned $67,019 from selling credit life insurance through First Alabama in 1991" and noted, in a model of understatement, that "the punitive damages award removes this profit and so exceeds it that Union Security will recognize a significant loss." *Id.* at 8a. In so stating, the court utterly ignored its prior recognition that the tort committed against the Crockers was an isolated incident and that therefore virtually all of the $67,000 figure represents not ill-gotten gain but rather perfectly legitimate profits from the operation of a lawful business.[24] Nor did

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[24] Because Mr. Crocker's premium was credited against the loan balance, Union Security in fact obtained no "profit" as a result of Taylor's one-time "fraud." Even if there had been no credit, however, Union Security's "profit" (actually, gross revenues before expenses) could not have exceeded

the court make the slightest effort to explain why a punishment that removes more than ten years worth of lawful profit is warranted under the facts of this case.

In this regard, the Alabama Supreme Court again seems to have learned nothing from *BMW*. There, as here, that court purported to apply the profit factor, but nonetheless sustained a punitive award that bore no relationship to the alleged ill-gotten gains. As Justice Breyer noted in *BMW*, the profit factor "has the ability to limit awards to a fixed, rational amount. But as applied, that concept's potential was not realized, for the [Alabama Supreme Court] did not limit the award to anywhere near the $56,000 in profits evidenced in the record. Given the record's description of the conduct and its prevalence, this factor could not justify much of the $2 million award." 116 S. Ct. at 1606 (Breyer, J., concurring).

As with the three *BMW* guideposts, the Alabama Supreme Court's cavalier treatment of the profit factor reflects that that court continues to fail to apply "clear legal principles" in a way that "significantly constrain[s] punitive damages awards." *Id.* at 1609 (Breyer, J., concurring). Because, as applied here (and elsewhere), the legal standards utilized by the Alabama Supreme Court "offer virtually no constraint," "this Court's detailed examination of the award" is warranted. *Ibid.*

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the $1,659 premium for insuring both Mr. and Mrs. Crocker. Needless to say, the punitive damages bear no relationship to that figure.

CONCLUSION

The petition should be granted and the judgment below summarily reversed; alternatively, the Court should grant plenary review to provide additional guidance on the appropriate application of the *BMW* guideposts.

Respectfully submitted.

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FEBRUARY 1998

APPENDIX A

UNION SECURITY LIFE INSURANCE COMPANY

v.

EVELYN CROCKER.

1931672.

Supreme Court of Alabama.

Aug. 15, 1997.

Appeal from Choctaw Circuit Court (CV-92-064)

On Remand from the United States Supreme Court

BUTTS, JUSTICE.

The Supreme Court of the United States has vacated our judgment in this case and has remanded the case for our further consideration in light of *BMW of North America, Inc.* v. *Gore*, 517 U.S. ----, 116 S.Ct. 1589 (1996).

In *BMW*, Dr. Ira Gore sued BMW of North America for damages for fraud, based upon BMW's failure to disclose that it had made presale repairs to an automobile it sold to him as new. The jury awarded Gore $4,000 in compensatory damages and $4 million in punitive damages; this Court reduced the punitive award to $2 million. See *BMW of North America, Inc.* v. *Gore*, 646 So.2d 619 (Ala.1994). The Supreme Court determined that the $2 million punitive damages award was "grossly excessive," particularly in relation to the compensatory damages award, and violated the Due Process Clause of the Fourteenth Amendment. 517 U.S. at ----, 116 S.Ct. at 1599. The Supreme Court then remanded the *BMW* case, as well as this present case, for this Court to reconsider in each the punitive damages award.

I.

We begin with this statement of the pertinent facts, as they are set out in our original opinion in this case, *Union Sec. Life Ins. Co.* v. *Crocker*, 667 So.2d 688 (Ala.1995):

> "Union Security ... sells credit life insurance through lending institutions nationwide, including [First Alabama Bank of Choctaw]. Various First Alabama loan officers are contractually authorized in this state to take

applications for credit life insurance from their customers and to issue certifications of insurance for approved applications, showing that the coverage is in effect.

"Union Security requires that, for credit life policies issued in conjunction with First Alabama loans in excess of $10,000, the customer execute a 'Statement of Debtor's Physical Condition' before credit life coverage is issued. This health disclosure statement authorizes Union Security to receive any information related to the health ... of the applicant, as long as this information is for the purpose of evaluating or underwriting the application for credit life coverage.

"The health disclosure statement has nine boxes to be checked 'yes' or 'no' in response to specific questions concerning the applicant's medical history. [Before it will issue coverage to an applicant,] Union Security requires that all of these boxes be checked 'no,' indicating that the applicant has had no prior ... illnesses [or poor health conditions]. ... Union Security [reserves] the right to examine applicants' health records to determine 'after the fact' whether coverage should have been issued. Union Security does not issue a written policy to those applicants who are accepted for coverage.

"In October 1990, Union Security was selling credit life insurance in conjunction with loans made by First Alabama in Choctaw County, Alabama. Union Security authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants, and it paid him a commission of the premiums on the credit life policies that it issued pursuant to the applications he obtained.

"[Evelyn and Coleman Crocker] knew Taylor and contacted him at the bank to inquire about obtaining a consolidation loan. Taylor advised Mrs. Crocker to pick up an application from the bank and complete it; [the Crockers] picked up one and then they met with Taylor. During this meeting, Taylor completed a separate health disclosure statement for each of the Crockers. He had

> premarked each of the nine health questions on the statements by checking the 'no' boxes, indicating that neither of the Crockers suffered from any past illnesses. Mr. Crocker, however, had been suffering from Parkinson's disease for some years and had also undergone serious heart surgery twice within the last 10 years. The Crockers signed the respective health disclosure statements that Taylor had prepared for them.
>
> "....
>
> "... There was ... evidence that Taylor and his wife had vacationed with the Crockers and that they had visited them in their home during the years that Mr. Crocker suffered from heart disease and Parkinson's disease. In spite of this, Taylor nevertheless indicated on the health disclosure statement that the Crockers were in good health and had no history of illness; doing so enabled him to issue the insurance policy on them and collect the commission from the policy for himself."

667 So.2d at 691-92.

Mr. Crocker died from heart disease in August 1991; Mrs. Crocker submitted a death certificate to Union Security and attempted to collect the credit life benefits. Union Security investigated the claim and denied coverage, based on Mr. Crocker's history of heart disease. Without her husband's income, and without the benefits of the coverage for which she had paid premiums, Mrs. Crocker was unable to pay off the balance on her First Alabama loan. On December 11, 1991, Taylor wrote Mrs. Crocker to inform her that, because of her default on the loan, First Alabama would foreclose the mortgage on her double-wide mobile home, which was the collateral for the loan. The foreclosure was to take place on December 20, 1991, five days before the first Christmas that Mrs. Crocker would spend as a widow. The foreclosure proceedings were halted only after Mrs. Crocker obtained legal counsel. Mrs. Crocker subsequently brought this fraud action against Union Security, Taylor, and First Alabama.

II.

With these facts in mind, we will now apply the three "guideposts" set out by the United States Supreme Court in *BMW* v. *Gore*, which are intended to gauge whether Union Security had received adequate notice that misconduct such as that committed in this case could lead to a $2 million punitive damages award.

A. The Reprehensibility of Union Security's Misconduct

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at ----, 116 S.Ct. at 1599. Although the Supreme Court in *BMW* did not provide any particular yardstick by which to measure reprehensibility, it did acknowledge that "'trickery and deceit' ... are more reprehensible than negligence" and that acts of affirmative misconduct, such as making deliberate false statements, are more reprehensible that an innocent misrepresentation. 517 U.S. at ----, 116 S.Ct. at 1599. Likewise, this Court has stated that in determining the reprehensibility of a defendant's conduct the reviewing court may consider "'[the] duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover up" of that hazard, and the existence and frequency of similar past conduct.'" *Green Oil Co.* v. *Hornsby*, 539 So.2d 218, 223 (Ala.1989), quoting *Aetna Life Ins. Co.* v. *Lavoie*, 505 So.2d 1050, 1062 (Ala.1987).

The evidence shows that the Crockers could not obtain the First Alabama loan they needed unless they also obtained credit life insurance from Union Security. Sammy Taylor, acting as Union Security's agent, knew that applicants for credit life insurance who revealed previous or existing health problems on the health disclosure statement contained in the application would not qualify for the coverage. There was evidence that Taylor was a friend of Mr. Crocker, that he and his wife had vacationed with the Crockers, and that they had visited the Crockers during the time that Mr. Crocker suffered from both Parkinson's disease and heart disease. There is evidence that Taylor knew that these health conditions existed when Mr. Crocker and his wife applied to him for credit life insurance in conjunction with this home equity loan. Taylor knew that he would receive a commission from the sale of credit life

insurance to Mr. Crocker, even if a future claim for the benefits was denied.

With this knowledge, Taylor deliberately precompleted for the Crockers the health disclosure statement on the Crockers' application form, marking "No" beside questions that asked if Mr. Crocker suffered from heart disease or certain other illnesses. Taylor thus intentionally falsified information on the Crockers' life insurance application, to secure a fraudulent approval by Union Security. He did so knowing that the Crockers were relying on the coverage to pay off the loan and to prevent the foreclosure of their home mortgage in the event either of them died. He assured them they would receive coverage, and he collected his commission when they did, knowing that their benefits would be denied if his false representations on their applications were discovered after the fact.

Union Security issued insurance to Mr. Crocker without any meaningful knowledge of his medical history, and it collected premiums from him until he died on August 28, 1991. When Mrs. Crocker, newly widowed, submitted her claim for benefits under the policy, Union Security denied it, leaving her with no means to pay her debt to First Alabama. She was threatened with foreclosure of her home mortgage, only five days before the first Christmas that she would spend without her husband after 31 years of marriage.

Given these facts, we agree that the gravity of Union Security's misconduct is a factor that would support a considerable punitive damages award. However, we must also recognize that Union Security's misconduct appears to have been an isolated incident, rather than the result of a standard operating procedure. The evidence shows that in 1991 Union Security received 134 claims for payment on credit life insurance issued through First Alabama, and that Mrs. Crocker's claim was the only one it denied. In 1992, Union Security received 119 claims for payment and denied only two; both were denied because the insureds had committed suicide and the policies had suicide-exclusion clauses. In 1993, Union Security received 113 claims and denied only four of them. Thus, during the period 1991-1993, Union Security's denial rate on credit life claims was less than 1% and most of the denials were based upon an insured's having committed suicide. The evidence thus

indicates that, while Union Security's misconduct in this case was highly reprehensible, it was also an aberration for the company.

B. The Ratio of Punitive Damages to Compensatory Damages

According to the United States Supreme Court in *BMW*, a second factor to be considered in determining whether an award of punitive damages is excessive is the ratio of punitive damages to the actual harm inflicted upon the plaintiff. Because the jury awarded general damages in this case, we cannot determine with certainty the ratio of punitive damages to compensatory damages. Certainly we do not consider the compensatory damages award to be based solely upon economic loss, as Justice See suggests in his dissent. Rather, we have thoroughly reviewed the compelling evidence of Mrs. Crocker's emotional and mental distress over Union Security's misconduct, as well as her economic loss, in determining the possible ratio of punitive damages to compensatory damages.

The evidence shows that Mrs. Crocker suffered as much as $16,222.61 in actual economic loss, representing not only the $1,659.61 that Mrs. Crocker and her husband paid for the credit life insurance, but also the $14,563 outstanding balance on the loan, which the insurance policy was to have paid. It is important to recognize that this economic injury was catastrophic for Mrs. Crocker in the wake of her husband's death; without his income to help make the loan payments to First Alabama, those benefits were all she had to keep from losing her home to foreclosure.

The United States Supreme Court in *BMW* held that an economic loss to the plaintiff in that case, a well-to-do medical doctor, did not support a large punitive damages award; however, the Supreme Court was careful to point out that economic injury inflicted upon the "financially vulnerable" is an entirely different concern and "can warrant a substantial penalty." 517 U.S. at ----, 116 S.Ct. at 1599. Where, as here, the economic harm could devastate its target, this is an especially serious consideration to be weighed against the amount of damages awarded. The Supreme Court also recognized in *BMW* that "[a] higher ratio [of punitive damages to compensatory damages] may ... be justified in cases in which the injury is hard to detect or the monetary value of

noneconomic harm [is] difficult to determine." 517 U.S. at ----, 116 S.Ct. at 1602.

Likewise, in the recent case of *First Commercial Bank* v. *Spivey*, 694 So.2d 1316 (Ala.1997), this Court emphasized: "There is no fixed standard for ascertaining the amount of compensatory damages that may be awarded for emotional distress. The determination of how much to award is left to the sound discretion of the jury, subject only to review by the court for a clear abuse of that discretion." 694 So.2d at 1326. In *Spivey*, this Court upheld the jury's award of $1 million in damages, $500,000 of which was compensatory damages awarded largely on the basis of the plaintiff's evidence of mental and emotional distress arising from the defendant's fraudulent conduct that led to the foreclosure of the mortgage on the plaintiff's home.

Aside from the economic loss the evidence suggests, there is the unknowable amount of compensation the jury could have awarded to Mrs. Crocker based upon the emotional and mental toll the wrongful conduct took upon her; that conduct led to her fight over insurance and caused her to face the threat of losing her home in foreclosure proceedings only months after losing her husband. Based on this evidence, we cannot conclude that the possible ratio of punitive damages to compensatory damages in this case would indicate excessiveness.

C. Civil Penalties for Comparable Misconduct

A third factor we must consider in determining whether the punitive damages award was excessive is the relationship of the punitive damages award to the civil or criminal penalties that could be imposed for comparable misconduct. *BMW*, 517 U.S. at ----, 116 S.Ct. at 1603. In *BMW*, the Supreme Court questioned whether the Alabama Deceptive Trade Practices Act, which imposes a maximum penalty of $2,000 for a violation, was adequate to provide BMW with notice of the severity of the punishment that would result from its deceptive practice. 517 U.S. at ----, 116 S.Ct. at 1603. However, as this Court stated in its opinion upon remand in *BMW of North America, Inc.* v. *Gore*, [Ms. 1920324, May 9, 1997] --- So.2d ---- (Ala.1997) ("*BMW II*"), the maximum statutory sanction against insurance fraud in this state is meager and, "[b]ecause the legislature has set the statutory penalty for deceitful conduct at such

a low level, there is little basis for comparing it with any meaningful punitive damages award." --- So.2d at ----.

III.

As we determined in *BMW II*, the United States Supreme Court's "due process" guideposts are not intended to exclude judicial consideration of the factors of review already established by this Court in *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala.1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989). We will now reconsider those factors as they apply in this case.

A. Union Security's Profit from its Misconduct

In a *Hammond-Green Oil* review, we are required to determine whether, if the wrongful conduct was profitable to the defendant, the punitive damages award removes the profit and is in excess of the profit, so that the defendant recognizes a loss. *Green Oil*, 539 So.2d at 223. It is undisputed that Union Security and Taylor made a profit from the sale of credit life insurance to the Crockers. Taylor testified that he received an annual commission of $600-$800 from selling credit life insurance for Union Security through First Alabama. There was evidence that Union Security earned $67,019 from selling credit life insurance through First Alabama in 1991. Clearly, the punitive damages award removes this profit and so exceeds it that Union Security will recognize a significant loss.

B. Union Security's Financial Position

In determining whether the punitive damages award was excessive, we must next consider Union Security's financial position. In 1993, when the jury awarded the damages in this case, Union Security had a net worth of $24,340,000. Out of that sum, Union Security had an unassigned surplus of approximately $15,000,000, from which it would pay the punitive damages award. Thus, the $2 million in punitive damages would remove 8.2% of Union Security's net worth and 13% of its available surplus. As we stated in *BMW II*, if a punitive damages award exceeds 10% of the defendant's net worth, that fact might, under certain circumstances, indicate that the punitive damages award has gone beyond reasonable punishment and is excessive, *BMW II*, --- So.2d at ----.

The punitive damages award in this case is close to that range, and we agree that it would be excessive for misconduct that, while reprehensible, was isolated.

C. The Costs of Litigation

In a *Green Oil* review, the court should consider whether the punitive damages award was sufficient to reward the plaintiff's lawyer for assuming the risk of bringing the lawsuit and to encourage other victims of wrongdoing to come forward. In its *Green Oil* review of this case, the trial court determined that the plaintiff's attorneys had spent approximately $35,000 in prosecuting this claim. Although the plaintiff's attorneys have since incurred additional expenses in defending the verdict and the punitive damages award on appeal before this Court and before the United States Supreme Court, the $2 million award is well out of proportion to these expenses.

D. Criminal Sanctions

A *Hammond-Green Oil* review requires us to consider whether criminal sanctions have been imposed on Union Security for its conduct. There were no such sanctions.

E. Other Civil Actions

The record does not indicate that other civil actions have been filed based on the same misconduct by Union Security that is present in this case.

IV. Conclusion

We have carefully reconsidered this case in view of the United States Supreme Court's ruling in *BMW* v. *Gore*, and we have conducted a second *Hammond-Green Oil* review. We find that Union Security's misconduct was highly reprehensible and that it caused Mrs. Crocker mental and emotional distress, as well as serious economic harm. However, the evidence indicates that this misconduct was an aberration for Union Security and that the $2 million award would take away a considerable percentage of Union Security's net worth as punishment for it. Based upon all the factors of this review, and given the evidence, we conclude that the $2 million award was excessive and that an award of $1 million would be proper.

The trial court's judgment and its order denying Union Security's motion for a new trial are affirmed on the condition that the plaintiff file with this Court within 21 days a remittitur of damages in the amount of $1 million, thus reducing the award to $1 million; otherwise, the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED CONDITIONALLY.

ALMON, SHORES, HOUSTON, KENNEDY, and COOK, JJ., concur.

HOOPER, C.J., and MADDOX and SEE, JJ., dissent.

HOOPER, CHIEF JUSTICE (dissenting).

I must respectfully dissent. It is clear from the record and this Court's earlier opinion in this case that the primary tortfeasor was First Alabama Bank. As this Court noted in its first opinion in this case, First Alabama has entered into a $1 million settlement with Mrs. Crocker. *Union Security Life Insurance Co.* v. *Crocker*, 667 So.2d 688, 690 (Ala.1995). I find no evidence of reprehensible conduct on the part of Union Security that would justify a substantial punitive damages award against it. Consequently, I conclude that the $2 million damages award against Union Security was grossly excessive.

Because we do not know the amount of punitive damages awarded by the jury's general verdict, I agree with Justice See that the case should be remanded. However, if it were proper for this Court to reduce the amount of punitive damages at this stage, I believe that several factors from *BMW of North America, Inc.* v. *Gore*, 517 U.S. ----, 116 S.Ct. 1589 (1996), mandate a substantial reduction of the damages awarded to Mrs. Crocker.

The Crockers' policy provided for a one-year contestability period.[1] Mr. Crocker died approximately nine months after the

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[1] A contestability period is the time during which an insurance company may contest the validity of the insurance contract because of misstatements on the application. If a policy has a one-year contestability period and the insured lives for more than a year after coverage commences, the coverage becomes incontestable even if the application

closing of the consolidation loan in connection with which he obtained credit life insurance. Thus, Union Security, after Mr. Crocker's death, properly investigated the answers provided on the application.

Sammy Taylor committed the wrongful conduct in this case. Taylor was the branch manager of the Gilbertown branch of First Alabama. Because there has been no finding that Union Security had knowledge of any fraudulent conduct on the part of its agent, Union Security's liability is entirely vicarious. The majority does not reduce the punitive damages award to an amount that appropriately reflects the wrongfulness of Union Security's conduct.

As the majority writes, the United States Supreme Court in BMW indicated that the first, and perhaps the most important, indicium of the reasonableness of a punitive damages award is the reprehensibility of the defendant's conduct. According to the majority, the reprehensibility of Union Security's conduct supports a substantial punitive damages award in this case. I disagree.

It is clear that Union Security is liable for the acts of Taylor, its Alabama insurance agent. See, e.g., *Wofford* v. *Safeway Ins. Co. of Alabama*, 624 So.2d 555 (Ala.1993). However, I do not believe that the full measure of Taylor's wrongful actions should be attributable to Union Security, at least not for the analysis under *BMW*. There is a noticeable lack of evidence from which one could conclude that Union Security supported Taylor's conduct, or, for that matter, that Union Security had any knowledge at all of Taylor's deception or of any previous misconduct by Taylor as an agent. In fact, the majority writes that the evidence indicates that any misconduct attributable to Union Security was an "aberration for the company." --- So.2d at ----. While I agree that Union Security is subject to liability for the acts of its agent, I do not agree that in examining a punitive damages award for excessiveness the principal's ratification or nonratification of the agent's misconduct is totally irrelevant.

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contained material misstatements. Under Alabama law, ordinary life insurance policies are incontestable after a maximum of two years. Ala.Code 1975, § 27-15-4. Credit life insurance policies are incontestable after only 12 months. See Ala. Ins. Reg. No. 28, § VI(J)(2) (1991).

As for the analysis under the third "guidepost" stated by the Supreme Court in *BMW*, the size of criminal and civil penalties for comparable misconduct, I find myself, once again, disagreeing with the majority. The majority writes that, because it finds the penalties for deceitful conduct in Alabama to be so meager, there is little basis for comparing the penalty with any punitive damages award. The most important consideration behind the analysis called for by this "guidepost" is the notice available to this defendant of what penalty might be imposed upon it for deceitful conduct. The fact that the penalty is meager argues in favor of a reduction in the punitive award. If the penalty is meager, then the defendant received less notice that it would be subject to such an extraordinary punitive damages award. On the basis of this portion of the *BMW* analysis alone, I would substantially reduce the damages award in this case.

This Court should remand this case for the trial court to determine which portion of the award was punitive and which portion was compensatory. I also believe that this Court has once again ignored the United States Supreme Court's admonition that grossly excessive punitive damage awards, such as that awarded in this case, violate the Due Process Clause of the Fourteenth Amendment.

SEE, JUSTICE (dissenting).

The record in this case does not specify how much of the general award represents punitive damages and how much represents compensatory damages. It is therefore impossible to determine whether the punitive award is excessive. This case should be remanded for a determination of what portion of the general award is punitive. I, therefore, respectfully dissent.

Mr. and Mrs. Crocker borrowed money from First Alabama Bank. A First Alabama employee sold the Crockers a credit life insurance policy issued by Union Security Life Insurance Company ("Union Security") to insure payment of the loan. While acting in the capacity of an agent for Union Security, the First Alabama employee falsified answers on the credit life application.

Mr. Crocker died of heart disease less than a year later. Pursuant to the terms of the policy, Union Security investigated

Mrs. Crocker's insurance claim and discovered that Mr. Crocker had had a history of heart disease that was not disclosed on the application form. Accordingly, Union Security denied payment. Mrs. Crocker, unable to pay, defaulted on the loan. First Alabama instituted foreclosure proceedings.

Mrs. Crocker sued Union Security, First Alabama, and the First Alabama employee. The jury awarded her a $5 million general verdict. The trial court reduced that award to $3 million. First Alabama settled for $1 million, leaving Union Security facing the $2 million balance. Union Security alone appealed. This Court affirmed the $2 million award. *Union Sec. Life Ins. Co.* v. *Crocker*, 667 So.2d 688 (Ala.1995). The Supreme Court of the United States vacated this Court's judgment and remanded this case for reconsideration in light of *BMW of North America, Inc.* v. *Gore*, 517 U.S. ----, 116 S.Ct. 1589 (1996) ("*BMW*"). *Union Sec. Life Ins. Co.* v. *Crocker*, --- U.S. ----, 116 S.Ct. 1872, 135 L.Ed.2d 169 (1996). In *BMW*, 517 U.S. at ---- - ----, 116 S.Ct. at 1599-1604, the Supreme Court established, for the first time, three guideposts for assessing whether a punitive award exceeds the outer limit of federal due process. These are: (1) the ratio of punitive damages to compensatory damages; (2) civil and criminal sanctions for comparable misconduct; and (3) the reprehensibility of the defendant's conduct.

First, the ratio of punitive damages to compensatory damages that the United States Supreme Court requires us to consider, *BMW*, 517 U.S. at ---- - ----, 116 S.Ct. at 1601-03, cannot be computed when both numbers that would compose the ratio are unknown. In this case, the general verdict specifies neither the amount of compensatory damages nor the amount of punitive damages; thus, it is impossible to compute the ratio.

Second, the comparison of civil and criminal sanctions to the punitive award, which the United States Supreme Court requires us to consider, *BMW*, 517 U.S. at ---- - ----, 116 S.Ct. at 1603-04, cannot be made when the amount of punitive damages is unknown. In this case, comparison of a civil or criminal sanction to an unknown portion of the $2 million general award is meaningless.

Undaunted by the impossibility of applying the first two guideposts, the majority attempts to justify the unknown punitive

award solely on the reprehensible nature of the defendant's conduct. The majority relies on the telephone call to Mrs. Crocker five days before Christmas informing her of a pending foreclosure on her home mortgage. However, it was not the defendant in this appeal, Union Security, that made the call. It was First Alabama. And when First Alabama made the call, it was acting as a foreclosing creditor, not as the sales agent for Union Security. First Alabama settled with Mrs. Crocker and is not subject to the unspecified punitive award here affirmed by the majority.

I would remand this case for the trial court to determine the amounts of punitive and compensatory damages,[2] because those amounts are necessary for a considered review.[3] Without the kind of information that we can obtain here only through remand, any review of the appropriateness of the punitive damages award is arbitrary.

An indispensable characteristic of a sound legal system is the production of predictable results. This guards against the arbitrary use of governmental power[4] and allows the bench, the bar, and,

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[2] In *Hammond* v. *City of Gadsden*, 493 So.2d 1374, 1379 (Ala.1986), this Court required "trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." I reiterate the necessity for trial courts to examine with specificity each of the factors set forth in *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989), in light of the evidence at trial and to reflect in the record how the final punitive award was determined.

[3] In my view, the appropriate review after remand would be based on the cogent analysis set forth in Justice Houston's special concurrence in *BMW of North America, Inc.* v. *Gore*, [Ms. 1920324, May 9, 1997] --- So.2d ----, ---- (Ala.1997).

[4] Compare, e.g., 1 William Blackstone, *Commentaries* *46 (describing the Roman emperor Caligula's unjust practice of writing his laws in small characters and hanging them on high pillars, thereby facilitating arbitrary enforcement) with J.B. Bury, *A History of Greece* 179 (Modern Lib. ed.1937) (describing the Greek lawgiver Solon's just practice of inscribing his laws on wooden tables and placing them on revolving stands in the Public Hall of Athens, thereby facilitating consistent enforcement).

most importantly, the people to order their affairs.[5] This Court's punitive damages jurisprudence has failed to produce predictable results.[6] The fact that the majority inexplicably reduces the award here to $1 million makes the review process no less arbitrary.

The standards this Court established in *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989), are designed to prevent arbitrary punitive damages awards. As Justice Breyer observed in his concurrence in *BMW*, 517 U.S. at ----, 116 S.Ct. at 1609, however, this Court's application of those standards "violate[d] the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides." That the misapplication of the three guideposts produces arbitrary results is illustrated by the majority's holding in the three cases decided since *BMW*:

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[5] As Justice Holmes stated:

> "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves [i.e., public enforcement of judicial decrees], and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of public force through the instrumentality of the courts."

Oliver Wendell Holmes, Jr., *The Path of the Law, in Collected Legal Papers* 167, 167 (Legal Classics Lib. ed.1982).

[6] A majority of this Court has also rejected the Legislature's attempt to provide predictability. Compare *Henderson* v. *Alabama Power Co.*, 627 So.2d 878 (Ala.1993) (holding that the statute limiting punitive awards violated the Alabama Constitution) with *BMW of North America, Inc.* v. *Gore*, 517 U.S. ---, --- - ---, 116 S.Ct. 1589, 1608-09, 134 L.Ed.2d 809 (1996) (Breyer, J., concurring) (citing favorably Texas, Connecticut, Florida, and Georgia statutes that limit punitive damages awards).

Case	Punitive Award	Compensatory Award	Ratio	Reprehensibility[7]
BMW II[8]	$50,000	$4,000	13:1	Low
Johnson II[9]	$3,000,000	$250,000	12:1	High
Crocker II	$985,437	$14,563[10]	68:1	Low

I dissent.

MADDOX, J., concurs.

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[7] These ratios are rounded to the nearest whole number.

[8] *BMW of North America, Inc.* v. *Gore*, [Ms. 1920324, May 9, 1997] --- So.2d ---- (Ala.1997).

[9] *Life Ins. Co. of Georgia* v. *Johnson*, [Ms. 1940357, August 15, 1997] --- So.2d ---- (Ala.1997).

[10] This number represents the economic loss apparently suffered by Mrs. Crocker. The damages are computed by comparing her economic position when Union Security refused to pay the balance due on the loan with the position she would have been in had Union Security paid the balance due on the loan. In both instances, Mrs. Crocker would have paid the $1,660 in premiums to Union Security. In this instance, however, Mrs. Crocker did not receive the $14,563 payment from Union Security to pay off the loan. Because the amount of compensatory damages in this case is unknown, I use Mrs. Crocker's apparent economic damages for purposes of illustration.

APPENDIX B

UNION SECURITY LIFE INSURANCE COMPANY

v.

Evelyn CROCKER.

No. 1931672.

Supreme Court of Alabama.

Sept. 8, 1995.

BUTTS, JUSTICE.

Evelyn Crocker, individually and as the beneficiary and administratrix of the estate of Coleman S. Crocker, sued Union Security Life Insurance Company ("Union Security") and First Alabama Bank of Choctaw ("First Alabama"), alleging claims of fraud, concealment, breach of contract, bad faith, and a scheme to defraud, in relation to First Alabama's sale of credit life insurance policies and Union Security's failure to pay benefits under those policies. Mrs. Crocker subsequently amended her complaint to reflect that she was proceeding only in an individual capacity and not as the the beneficiary and administratrix of the estate of Coleman S. Crocker.

Mrs. Crocker alleged that Sammy Taylor, as an agent for both First Alabama and Union Security, induced her to buy a credit life insurance policy on the life of her husband although he knew that Mr. Crocker had a history of heart problems and was uninsurable. She further alleged that Taylor failed to ask the Crockers for medical information and that Taylor falsified the information he put on the credit life insurance application. Mrs. Crocker also alleged that, after her husband's death, Union Security breached its contract of insurance by failing to pay benefits and that this failure was part of a scheme of intentional fraud in relation to the selling of credit life policies.

The trial court dismissed the breach of contract and bad faith claims, and the fraud claims went to trial. The jury returned a verdict of $5 million for Mrs. Crocker, and the trial court entered a judgment upon this verdict. Both First Alabama and Union Security moved for a J.N.O.V., a new trial or, in the alternative, a

remittitur, and moved to stay execution of the judgment until their post-judgment motions were ruled upon. After a hearing, the trial court denied the defendants' J.N.O.V. motion and further denied the defendants' motion for new trial, subject to Mrs. Crocker's acceptance of a $2 million remittitur. Mrs. Crocker accepted the remittitur, and Union Security alone appealed.

During the pendency of this appeal, Mrs. Crocker entered into a pro tanto release with First Alabama, accepting $1 million in exchange for releasing First Alabama from any further liability in the case. When Union Security discovered this agreement, it filed in this Court a motion for an "emergency remand," arguing that the verdict was excessive against it as the sole remaining defendant and demanding a hearing in the trial court on the matter. This Court initially denied the motion, but later, after reconsideration, granted it and remanded the case for the circuit court to review the judgment for excessiveness, in accord with *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989). On remand, the circuit court entered an order reaffirming its original *Hammond* order, without conducting a second hearing. Union Security's appeal on the merits was then returned to the active docket of this Court.

I.

Union Security, which is headquartered in Atlanta, Georgia, and which is part of a European holding company, sells credit life insurance through lending institutions nationwide, including First Alabama. Various First Alabama loan officers are contractually authorized in this state to take applications for credit life insurance from their customers and to issue certifications of insurance for approved applications, showing that the coverage is in effect.

Union Security requires that, for credit life policies issued in conjunction with First Alabama loans in excess of $10,000, the customer execute a "Statement of Debtor's Physical Condition" before credit life coverage is issued. This health disclosure statement authorizes Union Security to receive any information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, as long as this information is for the purpose of evaluating or underwriting the application for credit life coverage.

The health disclosure statement has nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. Union Security requires that all of these boxes be checked "no," indicating that the applicant has had no prior history of particular illnesses before it will issue credit life coverage for the applicant. Union Security does not examine the health records of those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine "after the fact" whether coverage should have been issued. Union Security does not issue a written policy to those applicants who are accepted for coverage.

In October 1990, Union Security was selling credit life insurance in conjunction with loans made by First Alabama in Choctaw County, Alabama. Union Security authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants, and it paid him a commission of the premiums on the credit life policies that it issued pursuant to the applications he obtained.

The Crockers knew Taylor and contacted him at the bank to inquire about obtaining a consolidation loan. Taylor advised Mrs. Crocker to pick up an application from the bank and complete it; they picked up one and then they met with Taylor. During this meeting, Taylor completed a separate health disclosure statement for each of the Crockers. He had premarked each of the nine health questions on the statements by checking the "no" boxes, indicating that neither of the Crockers suffered from any past illnesses. Mr. Crocker, however, had been suffering from Parkinson's disease for some years and had also undergone serious heart surgery twice within the last 10 years. The Crockers signed the respective health disclosure statements that Taylor had prepared for them.

Mr. Crocker died from heart disease in August 1991. Mrs. Crocker submitted a death certificate to Union Security and attempted to collect the credit life policy benefits. Union Security investigated the claim and denied coverage, based on Mr. Crocker's history of heart disease.

II.

The first issue presented is whether the trial court erred in denying Union Security's motions for a summary judgment and a directed verdict on Mrs. Crocker's two claims involving alleged misrepresentation and concealment by Taylor. Union Security points out that Mrs. Crocker was required to establish (1) that Taylor had a duty to disclose an existing material fact; (2) that Taylor suppressed that fact; (3) that Taylor had actual knowledge of the fact and of its materiality; (4) that Mrs. Crocker's lack of knowledge of the material fact induced her to act; and (5) that she suffered actual damage as a proximate result. *Hardy* v. *Blue Cross & Blue Shield of Alabama*, 585 So.2d 29 (Ala. 1991).

The existence of a duty to disclose is a legal question and is to be discerned from the confidential relations of the parties or from the particular circumstances of the case. Ala. Code 1975, § 6-5-102; *Interstate Truck Leasing, Inc.* v. *Bender*, 608 So.2d 716 (Ala. 1992). Some factors the court may consider are the relationship of the parties, the value of the particular facts, and the relative knowledge of each party. *Bender*. Where the accused has superior knowledge of the fact and the other party is being induced to take action that that party might not have taken had he or she known the fact, the obligation to disclose is particularly compelling. *Bender*.

The evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage. Taylor testified that he knew that if he indicated on the application form that Mr. Crocker suffered from any health problems, the credit life policy would not be issued to him. Taylor stated that he knew the credit life policy included a one-year period wherein Union Security could investigate the Crockers' medical history after issuing the policy, even if it had not done so before issuing coverage. Taylor testified that he received a commission from each credit life policy that was issued, regardless of whether the company ultimately paid benefits to the insured or not.

Although Taylor denied knowing that Mr. Crocker had a history of heart disease, other witnesses testified that Taylor did know of Mr. Crocker's past heart surgeries and had inquired about his condition during his periods of convalescence. Although Taylor denied knowing that Mr. Crocker suffered from Parkinson's disease, the evidence shows that Mr. Crocker had experienced constant and noticeable tremors for years and had displayed this symptom of the disease on the day Taylor filled out the application for credit life insurance. There was also evidence that Taylor and his wife had vacationed with the Crockers and that they had visited them in their home during the years that Mr. Crocker suffered from heart disease and Parkinson's disease. In spite of this, Taylor nevertheless indicated on the health disclosure statement that the Crockers were in good health and had no history of illness; doing so enabled him to issue the insurance policy to them and collect the commission from the policy for himself.

There is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.

III.

Union Security next argues that the trial court committed several errors during the trial that require a reversal of the judgment against it.

Union Security first argues that the trial court erred in allowing into evidence the fact that it is a foreign-owned entity. Union Security claims that this evidence was injected into the trial as evidence of wealth, and it points out that a jury cannot consider the financial position of the defendant in assessing punitive damages. The questioning at issue occurred as follows:

"Q. Mr. Hall, I believe you said that a Ms. Calik is your underwriter in your department and works under you.

"A. Yes, she is.

"Q. She is employed by American Securities Insurance, is she not?

"A. She worked for an American Securities Group at Union.

"Q. American Securities Group and Union Security Life, they are both owned by the same company, are they not?

"A. Yes, the Group is not an insurance company. The insurance company is under that Group.

"Q. The Group is owned by Ferris Enterprises out of Europe. Is that correct?

"Mr. Robertson [counsel for Union Security]: Your honor, I'm going to object to the relevance of that question.

"The Court: What is the question, Mr. Morris?

"Mr. Morris [counsel for Crocker]: The question was that American Securities and Union—I mean, the American Security group that Ms. Calik works for in [Mr. Hall's] Department, and the Union Security Life Insurance Group are owned by Ferris Enterprises, which is a European company that owns both of them, but both people work in there.

"The Court: What's the purpose of this line of questioning?

"Mr. Morris: We are going to call Ms. Calik. She says in her deposition she worked for a separate company. I think we need to show that they are one and the same, basically.

"Mr. Robertson: Judge, we don't see where that is at all relevant to what we're here on.

"The Court: You don't need to get too far down the line. Go ahead.

"Mr. Morris: I won't. Go ahead.

"Q. [By Mr. Morris]: Isn't that true?

"A. That's not the name of the company, sir. It's Fortis, F-O-R-T-I-S.

"Q. Fortis. I'm sorry. Fortis Enterprises. All right. Now, either American Securities and/or the American Securities and Union Security do business with a number of banks. You don't do business with just First Alabama Bank?

"A. That's correct."

In this testimony, there was no mention of wealth in the questions, nor can we find any intimation of the surplus or net income of the corporations. We note that counsel for Mrs. Crocker mentioned in closing argument that Union Security's parent company was European; however, these remarks did nothing to establish any evidence of the corporation's wealth, and Union Security did not object to them. The trial court has broad discretion in ruling on matters in argument of counsel, *United Companies Fin. Corp.* v. *Brown*, 584 So.2d 470 (Ala. 1991), and, after reviewing the record surrounding this exchange, we cannot hold that the trial court erred in allowing the foregoing questions.

Union Security next argues that the trial court erred in allowing Mrs. Crocker to submit evidence of the amount of premiums First Alabama receives, on a statewide basis, from marketing credit life policies with its loans.

Mrs. Crocker submitted evidence that, for the years 1988, 1989, 1990, and 1991, First Alabama generated almost $40 million in gross premiums through the sale of credit life insurance. Mrs. Crocker also established that the loss ratios of Union Security with First Alabama through these four years were, respectively, 20.6%, 21.1%, 16.3% and 17.0%. She also presented expert testimony indicating that a 50% loss ratio was a more reasonable balance between the insurer and the insureds.

Mrs. Crocker points out that fraud loss ratios are admissible in evidence, *Independent Life & Accident Insurance Co.* v. *Harrington*, [Ms. 1921093, August 5, 1994] --- So.2d ---- (Ala. 1994), and argues that she could not compute the loss ratios for the jury without showing the gross earned premiums. Moreover, Union Security did not request a jury charge to limit consideration of the $40 million figure. After reviewing the record concerning the loss ratios, and the evidence as a whole, we find no error in the admission of evidence concerning First Alabama's gross earned premiums.

Union Security next argues that the trial court erred in refusing to charge the jury that punitive damages are not recoverable for innocent or mistaken fraud. Union Security requested the following charge: "The Plaintiff is not entitled to punitive damages if you find that Sammy Taylor committed a fraud upon the plaintiff that was committed mistakenly, innocently or negligently." The trial court rejected this proposed charge and ultimately instructed the jury:

> "Now, ladies and gentlemen of the jury, if you are reasonably satisfied that the defendants have been shown by clear and convincing evidence to be guilty of an intentional misrepresentation, deceit or concealment of a material fact, which the defendants had a duty to disclose, which was gross, oppressive or malicious, and committed with the intention on the part of the defendants of thereby depriving the plaintiff of property or legal rights or otherwise causing injury, and the plaintiff did suffer injury or damage as a proximate result of such fraud, then in your discretion you may award the plaintiff punitive damages in addition to any actual damages you find from the evidence the plaintiff did suffer."

With this, the trial court correctly set out the very clear, specific limits on the type of intentional fraud that must underlie an award of punitive damages; nothing in this instruction would lead a jury to believe that an innocent or mistaken fraud could support a punitive damages award, so there was no reason to think an additional instruction would be needed. The trial court's refusal of a requested written instruction, even though it is a correct statement

of law, is not a cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge. See Rule 51, Ala.R.Civ.P. We therefore find no merit in Union Security's argument on this point.

IV.

Union Security argues that the jury's verdict resulted from obvious bias, passion, and prejudice, and that it is due another hearing on the verdict. The trial court is peculiarly qualified to pass judgment on whether the verdict is the result of bias or prejudice. *Davidson* v. *Mobile Infirmary*, 518 So.2d 675 (Ala. 1986). Following the hearing on the question of excessiveness of the verdict, the trial court stated in its order that it considered "the presentation of the case by the respective attorneys; the demeanor, candor, and apparent truthfulness of the witnesses; the attentiveness by members of the jury and the 'feel' for fairness vel non in the atmosphere wherein the trial is conducted." Although the trial court went on to find that the verdict was excessive, it did so based solely on its determination that the award exceeded an amount necessary to accomplish society's goal of punishment and deterrence, based on the facts of this case. Our review of the record reveals nothing that contradicts the trial court's own observations made during the trial; thus, we find no error in its determination.

Union Security next argues that the trial court failed to properly review the jury verdict for excessiveness in accordance with the established standards set out in *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989).

In ruling on a motion for remittitur in a punitive damages case, the trial court must make essentially two separate but related determinations: whether the amount of the jury's verdict was set by a properly functioning jury and, if so, whether the verdict was nevertheless excessive as a matter of law because it exceeds an amount that will accomplish society's goals of punishment and deterrence. *Hammond*. We have already upheld the trial court's determination that the verdict was not tainted or influenced by bias, passion, prejudice, corruption, or other improper motive or cause. The question now is whether the jury verdict was excessive as a matter of law.

In ruling on this issue, the trial court could consider several factors, including (1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as the harm that actually has occurred; (2) the degree of responsibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (3) the profitability of the defendant's conduct; (4) the financial position of the defendant; (5) the costs of litigation; (6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Green Oil.*

The trial court's order following the *Hammond* hearing shows that the court extensively reviewed its copious trial notes, as well as the evidence and relevant case law on comparative punitive damages awards. The trial court's order reflects a thorough analysis of the jury verdict and, after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies. This Court recently observed the nature of this inequity in *Huff* v. *United Ins. Co. of America*, [Ms. 1931516, May 26, 1995] --- So.2d ----, ---- (Ala.1995), wherein we stated:

> "As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health

history. Such a requirement could prevent situations like the one in this case."

Union Security argues that it is entitled to a second *Hammond* hearing for a reassessment of the *Green Oil* factors in light of the fact that First Alabama had settled its liability. We note, however, that in its first *Hammond* order, the trial court specifically found that Union Security and First Alabama were jointly and severally liable for the judgment and that there was no evidence that "an award of $5,000,000 would place either defendant in receivership or bankruptcy." The judgment is now, of course, reduced to $2 million dollars and, in its second *Hammond* order, the trial court confirmed that it had already thoroughly reviewed the *Green Oil* factors and considered a second hearing unnecessary. After reviewing all of the record, we agree that the trial court's findings following the first *Hammond* order took into consideration the *Green Oil* factors as they applied to Union Security jointly with First Alabama and as they applied to Union Security separately. We therefore find no error in the trial court's refusal to conduct a second hearing before issuing its second *Hammond* order after First Alabama had settled its liability to Mrs. Crocker.

Based on the foregoing, we affirm the trial court's judgment against Union Security.

AFFIRMED.

ALMON, SHORES, KENNEDY, and COOK, JJ., concur.

HORNSBY, C.J., and HOUSTON and INGRAM, JJ., recused.

On Application For Rehearing

OPINION MODIFIED (BY SUBSTITUTION OF PAGES 1-16); APPLICATION OVERRULED.

APPENDIX C

IN THE CIRCUIT COURT OF

CHOCTAW COUNTY, ALABAMA

EVELYN CROCKER,

PLAINTIFF,

vs.

CASE NO.
CV-92-064 K

UNION SECURITY LIFE
INSURANCE COMPANY, AND
FIRST ALABAMA BANK,

DEFENDANTS.

ORDER

On February 17, 1994, a verdict was returned in this cause whereby the jury found for the plaintiff and against the defendants and assessed plaintiff's damages at $5 million. No request was made for the jury to be polled. The Court entered judgment on the same date for the plaintiff, Evelyn Crocker, and against the defendants, Union Security Life Insurance Company and First Alabama Bank, and assessed the plaintiff's damages at five million dollars ($5,000,000.00).

Subsequently, each defendant filed a motion for judgment notwithstanding the verdict or for new trial or remittitur. Initially, the Court set the said motions for hearing on June 1, 1994, which, by agreement of all parties, were continued until June 30, 1994. It was expressly agreed by all parties that said motions would remain pending in the trial court for ruling until July 22, 1994; and, by express consent of all parties, which said consent appears of record in this cause, the said motions remain pending in the trial court for ruling until July 29, 1994.

The plaintiff's amended complaint was very precise and succinct. The trial of this cause was not especially lengthy, lasting only approximately four (4) days. The jury deliberated just thirty-six (36) minutes. However, February 17, 1994, will long remain as a day of demarcation for the assessment of damages by juries in

lawsuits tried in Choctaw County, Alabama, for the verdict in this cause is far in excess of any previously awarded.

The reverberations resulting from the jury verdict in this cause will be long lasting throughout the local legal community and the county. When the verdict was read, gasps were heard, sobs sounded, hearts pounded loudly (some from glee, others from alarm), for from this day forward, it would forever be remembered that large punitive damage awards were alive and well, not only in Alabama, but, for the first time, in Choctaw County.

The Court has carefully reviewed the pleadings, the testimony, and the oral charge in this cause; has read each post-trial brief and affidavit filed in this matter; has considered the testimony, evidence and arguments presented in the post-trial hearing; and has reviewed the various and numerous authorities submitted to the Court post-trial. For purposes of any appellate review, ALL of the foregoing are to be considered as matters of record in this cause, and the same are hereby ordered to be made a part of any record on appeal.

The Court conducted a charge conference in this clause. The forms of verdicts were reviewed by the Court with counsel. There were no exceptions to the forms of verdicts by any party nor was there a timely request by any party for an itemized verdict. This is noted because there were claims for both compensatory and punitive damages by the plaintiff, and the Court in its oral charge to the jury instructed on compensatory as well as punitive damages. Thus, this Court is somewhat in the same posture as was the Supreme Court of the United States in *Pacific Mutual Life Insurance Co. vs. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991), in attempting to ascertain the amount of punitive damages assessed by the jury. In *Haslip*, 111 S.Ct. at 1037, n.2, the Court stated, "...it is *probable* that the general verdict for respondent Haslip contained a punitive damages component of not less than $840,000. [Emphasis added.]" However, in the instant case it is more difficult for this Court to attribute the amount of the award to punitive damages, for the Court's oral charge to the jury on compensatory damages contained, inter alia, an element of damages for mental anguish. This is stated to illustrate that even though there certainly were punitive damages included in the jury's verdict in this cause, the exact amount thereof is not mathematically ascertainable.

Nevertheless, in accordance with Section 6-11-23(b) CODE OF ALABAMA, 1975, as amended, the Court did conduct a post-trial hearing "concerning the amount of punitive damages."

JUDGMENT NOTWITHSTANDING THE VERDICT

As was stated in *Baptist Memorial Hospital vs. Bowen*, 591 So. 2d 74, 77 (Ala. 1991), "A motion for JNOV is properly granted only when: 1) there is either (a) a complete absence of proof on a material issue of fact or (b) no factual controversy upon which reasonable people could differ; and 2) the movant is entitled to a judgment as a matter of law. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 773 (Ala. 1984). Furthermore, all reasonable inferences must be considered in a light most favorable to the nonmovant. Id." *See, also, Isbell vs. Smith*, 558 So.2d 877, 883 (Ala. 1989). Suffice it to conclude that there was significant conflict in the testimony presented in this cause and that the jury was convinced by clear and convincing evidence that there were facts supporting the plaintiff's claim. Too, the Court did not deny the motions for directed verdicts filed by the respective defendants without carefully reviewing the testimony and reflecting upon the plaintiff's cause of action.

All of the above being considered and understood, it is, therefore, ORDERED, ADJUDGED, and DECREED that defendant First Alabama Bank's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied. It is, further, ORDERED, ADJUDGED, and DECREED that defendant Union Security Life Insurance Company's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied.

MOTION FOR NEW TRIAL OR REMITTITUR

The Court observed the demeanor and credibility of the witnesses who testified in this cause, as well as each member of the jury during the course of the trial. At all times the jury appeared attentive. The witnesses seemed to be truthful and testified without regard to bias or prejudice. Admittedly, the plaintiff was emotional during periods of the trial, but the subject matter of her concern, i.e, the prospect of losing her home when she thought it would be paid for by her deceased husband's credit life insurance, causes any display of her emotions to be understandable. Obviously, the jury,

drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants.

As they perceived the evidence, it is obvious that the jury was shocked by the conduct of the defendants. In other words, from the jury's viewpoint the harm resulting to the plaintiff from the defendants' conduct was grievous. The cause of action in this case was not for negligence or breach of contract, but was for fraud. In reflecting upon some aspects of the evidence in this cause, it was undisputed that Sammy Taylor, duly authorized employee of defendant First Alabama Bank and licensed agent of defendant Union Security Life Insurance Company, never gave the plaintiff or her deceased husband, Coleman Crocker, either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased. In fact, Mr. Taylor did not even know the terms of the credit life insurance policy which he sold the plaintiff and her deceased husband, nor had he ever even seen such a policy of credit life insurance. Taylor even testified he didn't know "when" or "if" people were covered who purchased this type credit life insurance from the defendants. Perhaps, Mr. Taylor's position is understandable in light of the fact that he did not know the terms and conditions of the credit life insurance policy issued by Union Security Life Insurance Company nor had anyone from the insurance company ever explained to him the provisions of such a policy or the procedures relative to same. This agent's limited knowledge may make his actions understandable, but such does not make the defendants' conduct excusable. One can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth on the Statement. Both of these defendants were in this business to make money, and the sale of credit life insurance was profitable to both.

As stated in *Industrial Chemical vs. Chandler*, 547 So.2d 812, 837 (Ala. 1988),

> Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless

> serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example. But in levying a punitive award, the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to "fair" punishment; in other words, "although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. vs. Hornsby*, 539 So.2d 218 (Ala. 1989), citing *Maryland Casualty Co. vs. Tiffin*, 537 So.2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988), and *Roberson v. Ammons*, 477 So.2d 957 (Ala. 1985). Hence, we must ask, after the return of a jury award of punitive damages, what process is due the defendant to insure that he has been provided "fundamental fairness" at the hands of the law and to insure that society's goals of punishment and deterrence have been accomplished?

The Court will now review the issue of whether the punitive damages awarded herein were excessive. In doing so, the Court will follow the directives of the Supreme Court of Alabama as outlined in *Green Oil Co. vs. Hornsby* 539 So.2d 218 (Ala. 1989), and *Hammond vs. City of Gadsden*, 439 So.2d 1374 (Ala. 1986).

1. *Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred.*

This case involved misrepresentations made by the agent for defendants as well as concealment by the agent of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance. The plaintiff and her husband, Coleman Crocker, obtain a loan from defendant First Alabama Bank and purchased credit life insurance from loan officer Sammy Taylor. The policy of insurance was with defendant Union Security Life Insurance Company. The total amount of the loan, including the interest and cost of the credit life insurance, was, to-wit, twenty-one

thousand eight hundred seventy-three dollars ($21,873.00). The cost to the plaintiff and her husband for the credit life insurance was one thousand six hundred fifty-nine and 61/100 dollars ($1,659.61). The loan was obtained on, to-wit, October 15, 1990. Coleman Crocker died on August 28, 1991, and the insurance company refused to pay First Alabama Bank the outstanding balance of the loan in the amount of, to-wit, fourteen thousand five hundred sixty-three dollars ($14,563.00) because of a pre-existing heart disease, which did not appear on the Union Security Life Insurance Company form entitled Statement of Debtor's Physical Condition. The collateral for the loan was a double-wide mobile home in which the plaintiff and her deceased husband resided. The harm which resulted in this case is that the defendant Union Security Life Insurance Company failed to pay the claim of the plaintiff, *i.e.*, the balance of the loan to creditor-defendant First Alabama Bank, upon the death of plaintiff's husband, and thus not only was the loan, which was secured by a mortgage on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed. The damages to plaintiff were grievous and, therefore, damages should be substantial.

2. *The degree of reprehensibility of the defendant's conduct should be considered.*

This appears to be an isolated incident insofar as both defendants are concerned in failing or refusing to pay a credit life insurance claim premised upon the fraud of their agent. There is no evidence either defendant engaged in similar misrepresentations or concealments/suppressions in their dealings with other credit life insureds. In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants. This factor mitigates against the award of very significant punitive damages being assessed against the defendants.

3. *If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.*

It is without dispute that both defendants and their agent made a profit from the sale of credit life insurance. Mr. Taylor testified he received an incentive for selling credit life insurance for defendant Union Security Life Insurance Company while in the

employ of defendant First Alabama Bank ($600-$800 annually). At the post-trial hearing there was evidence that the defendant Union Security Life Insurance Company realized a net gain from the sale of credit life insurance in the amount of $1,290,000.00 during the year 1991. Defendant First Alabama Bank, system wide, earned total commissions for both credit life and credit accident and health in the year 1991 in the amount of $1,228,000.00, while First Alabama Bank-Choctaw received commissions on credit life insurance in 1991 in the amount of $53,000.00. The Court notes that upon instructions from defendant Union Security Life Insurance Company, defendant First Alabama Bank refunded both the principal and the interest in terms of the proportion of the premium that was attributable to Mr. Crocker by crediting it to the Crockers' loan. However, this action was not taken until after the litigation was initiated.

4. *The financial position of the defendant would be relevant.*

At the post-trial hearing, testimony was elicited that at the end of 1993 defendant Union Security Life Insurance Company had a net worth of $24,340,000.00. Testimony further revealed that in the event the entire five million dollar ($5,000,000.00) judgment was to be paid by this defendant, payment would come from its un-assigned surplus which totaled $14,990,000.00 at the end of 1993. This defendant contends that payment by it of the judgment would impair its competitiveness and adversely affect its ratings. Insofar as defendant First Alabama Bank is concerned, there was no evidence presented relative to its financial position. However, the Court takes judicial notice that it is a large financial institution with branches throughout, at least, much of the state of Alabama. Certainly, there was no evidence that an award of $5,000,000 would place either defendant in receivership or bankruptcy. Because the judgment was awarded the plaintiff against both defendants, it is significant that each is jointly and severally liable.

5. *All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.*

According to plaintiff's Post-Judgment Review of Punitive Damages brief, Mrs. Crocker's attorneys have already expended approximately $35,000. Compare this amount ($35,000) with the balance which was due on the plaintiff's loan, to-wit, $14,563, and

one readily understands the significance of the following statement in *Principal Financial Group vs. Thomas*, 585 So.2d 816, 818 (Ala. 1991):

> A lack of a means of litigating because the contract amount involved is too small to obtain lawyers who can afford to file suit to recover only the contract amount would potentially deprive an insured, who thinks her case is just, of her day in court. This may free insurance adjusters from fairly investigating and reviewing small claims and may result in a loss of faith in the judicial system. Is this likely harm slight or grievous? Grievous.

Interestingly, the record reveals that plaintiff had previously engaged the services of another attorney to represent her in this dispute. Perhaps, that attorney did not have the necessary financial resources or time to pursue this claim. Accordingly, the Court finds that the verdict should be high enough to award not only a plaintiff such as Mrs. Crocker, but also her attorneys, significant recovery to litigate this type of case.

6. *If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.*

There has been no evidence produced that criminal sanctions have been imposed upon either defendant.

7. *If there have been any other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.*

There was no evidence presented of any other civil actions against either defendant with circumstances similar to those presented in this case.

As stated previously, this Court has found no repeated wrongdoing by either defendant. This was an isolated incident. Additionally, defendant First Alabama Bank has taken steps to remedy the conduct complained by the plaintiff. This defendant has developed a manual explaining credit life insurance and in 1993 distributed a copy of this manual to each bank and loan officer in the First Alabama Bank system. Training sessions have been held

by this defendant wherein these manuals are explained to each loan officer. Among the instructions contained in the manual is one whereby there is a reminder that the insured debtor must be given a copy of the insurance certificate. First Alabama-Choctaw now requires the issuance of insurance certificates. Defendant Union Security Life Insurance Company has revised its UND-131 form Statement of Debtor's Physical Condition. The revised form UND-131A, contains the following language which was not printed on the original form: "Untruthful answers may result in denial of claims." These forms were shipped to defendant First Alabama Bank in December, 1990.

As was stated in *Nationwide Mutual Insurance Co. vs. Clay*, 525 So.2d 1339, 1344 (Ala. 1987),

> On state law grounds, Nationwide argues that punitive damages should bear some particular mathematical relationship to compensatory damages. However, we have repeatedly held that punitive damages need not *necessarily* bear any particular relationship to compensatory damages. *U-Haul Company of Alabama v. Long*, 382 So.2d 545 (Ala. 1980). We have said that decisions on punitive damages must be made on a case-by-case basis, and it is clear from our cases that this Court is willing to uphold substantial jury awards for damages, even in excess of $1,000,000, when the facts warrant such an award.

Thus, there is no particular relationship between the amount of compensatory damages and the punitive damages.

The relative brevity of this Order does not reflect the substantial amount of time this Court has devoted to this matter. The Court's copious notes of the trial of this case have been read and re-read; even portions of the transcribed testimony of some of the witnesses, and the oral charge have been reviewed. Every brief has been carefully considered, each having been read at least once. Numerous cases have been perused for, inter alia, comparative punitive damage awards, and the Court has conducted independent research. The Court has arrived at the conclusion that two of the most compelling considerations in developing this Order are: 1.) the right to a trial by jury is a fundamental, constitutionally guaranteed

right (see Art. I, Section 11, Constitution of Alabama of 1901); and 2.) applying the criteria approved in *Haslip*, *supra*, a defendant's constitutional due process rights are not violated by a jury's award of punitive damages which are subject to *meaningful and adequate review* by the trial court. Implicit in the trial court's review of any punitive damage award are personal observations of the Court considering the presentation of the case by the respective attorneys; the demeanor, candor and apparent truthfulness of the witnesses; the attentiveness by members of the jury; and the "feel" for fairness vel non in the atmosphere wherein the trial is conducted. All of these things have been considered from the unique position which was occupied by the trial court.

In the significant precedent case of *Green Oil Co. v. Hornsby*, *supra*, our Supreme Court stated as follows (at page 222):

> Because the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future, the proper amount of punitive damages rests largely within the jury's discretion. However, although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Maryland Casualty Co. v. Tiffin*, 537 So.2d 469 (Ala. 1988); *City Bank of Alabama v. Eskridge*, *supra*; *Roberson v. Ammons*, 447 So.2d 957 (Ala. 1985).

and

> Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals.

Following *Green Oil Co. v. Hornsby*, *supra*, the Supreme Court in *General Motors Corp. v. Johnston*, 592 So.2d 1054, 1060 said:

> The presumption of correctness of a jury verdict can be overcome only by a *clear* showing that the amount of the award is excessive. *Green Oil Co.*, 539 So.2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may substitute its judgment for that of the jury." *Green Oil Co.*, 539 So.2d at 222, citing *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Hammond*, 493 So.2d 1374.

The Court concluded its opinion by ordering a substantial remittitur.

Based on a thorough review of this case and on the amount of punitive damages awarded in other cases, this Court is of the opinion that the punitive damages award in this case is excessive and the Court orders a remittitur of $2,000,000. Even though a remittitur is necessary, this Court is of the opinion that the evidence supports a punitive damages award of $3,000,000. The determination of excessiveness is based upon applying the law that punitive damages should not exceed an amount necessary to accomplish society's goal of punishment and deterrence for the facts and circumstances of the case. The Court finds that an award of $3,000,000 will accomplish society's goals of punishment and deterrence in this case.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Motions for New Trial filed by defendant United Security Life Insurance Company and by defendant First Alabama Bank be, and the same hereby are, denied, subject to the acceptance by the plaintiff of a remittitur of $2,000,000 within twenty-eight (28) days of the date of this Order. Acceptance of a remittitur of $2,000,000 by the plaintiff will result in a judgment in her favor against the defendants for the sum of $3,000,000.

DONE this the 29th day of July, 1994.

HARDIE B. KIMBROUGH,
PRESIDING JUDGE

FIRST JUDICIAL CIRCUIT
OF ALABAMA

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APPENDIX D

IN THE CIRCUIT COURT OF
CHOCTAW COUNTY, ALABAMA

EVELYN CROCKER,

PLAINTIFF,

vs. CIVIL ACTION
CV-92-064 K

UNION SECURITY LIFE
INSURANCE COMPANY and
FIRST ALABAMA BANK,

DEFENDANTS.

ON REMANDMENT FROM THE
SUPREME COURT OF ALABAMA

This trial court received the following Order from the Supreme Court of Alabama, dated the 26th day of October, 1994:

IN THE SUPREME COURT OF ALABAMA
October 26, 1994

1931672

Union Security Life
Insurance Company

v. Choctaw Circuit Court
CV-92-064K

Evelyn Crocker

ORDER

The appellant having filed a motion to reconsider this Court's order of October 3, 1994, denying the appellant's motion for a remand of the above styled matter to the Circuit Court of Choctaw County for the purpose of holding a hearing in accord with *Hammond v. City of Gadsden*, 439 So.2d 1374 (Ala. 1986) and

Green Oil v. Hornsby, 539 So.2d 218 (Ala. 1989), and the same having been submitted and considered by the Court,

> IT IS CONSIDERED AND ORDERED that the motion to reconsider is granted and this matter is remanded to the Circuit Court of Choctaw County to review the judgment for excessiveness in accord with *Hammond* and *Green Oil, supra*, with return on this remand to be made within thirty days from the date of this order.
>
> Maddox, Almon, Shore, Houston, Steagall, Kennedy, and Cook, JJ., concur. Hornsby, C.J., and Ingram, JJ., recuse themselves.

This humble trial Court wishes to respectfully respond to said Order rather than taking any action relative to same because, stated simply, this Court can not procedurally discern why this Order was issued to *this Court*.

Initially, it is noted that there is no cause pending in the circuit court of Choctaw County, Alabama, styled *Union Security Life Insurance Company vs. Evelyn Crocker*. The Supreme Court's Order refers to case no. CV-92-064 K in the circuit court of Choctaw County, Alabama. The official court file in the office of the circuit clerk of Choctaw County, Alabama, in case no. CV-92-064 K is styled *Evelyn Crocker v. Union Security Life Insurance Company, and First Alabama Bank*.

Next, this trial Court has, in fact, already conducted a hearing and entered an order in accord with *Green Oil Co., vs. Hornsby*, 539 So.2d 218 (Ala. 1989), and *Hammond vs. City of Gadsden*, 439 So.2d 1374 (Ala. 1986); see fourteen (14) page ORDER attached hereto and made a part hereof. In attempting to follow the directives of *Green Oil* and *Hammond, supra*, the trial Court, *inter alia*, addressed seven (7) criteria relative to each of the said defendants (see attached ORDER beginning at page 6 thereof). The trial Court ordered a remittitur of two million dollars ($2,000,000.00), which, if accepted by the plaintiff, would result in a judgment in favor of the plaintiff and against the defendants for the sum of three million dollars ($3,000,000.00).

Finally, the *last* filing, over which the *trial* court had *jurisdiction*, was an Acceptance Of The (trial) Court's Remittitur

filed by the plaintiff and her attorneys of record. The said Acceptance resulted in a judgment in favor of the plaintiff and against each of the said defendants, jointly and severally, in the sum of three million dollars ($3,000,000.00). There is absolutely nothing else subsequently filed in the circuit court except an appeal by defendant Union Security Life Insurance Company to the Supreme Court of Alabama. It is this Court's understanding, based upon the record in the *trial* court, that there is presently pending in the circuit court of Choctaw County, Alabama, an unsatisfied judgment in favor of the plaintiff in the sum of three million dollars ($3,000,000.00), against each of said defendants, with defendant Union Security Life Insurance Company having filed an appeal relative to said judgment to the Supreme Court of Alabama. Absolutely nothing else is of record in the *trial* court.

This Court will note, being acutely familiar with every aspect of this cause at the trial court level, that these two (2) defendants never positioned themselves in an adversarial position to each other during the entire course of the trial proceedings. Their theories, defenses, and positions were not only similar, but the evidence presented by them as well as the arguments made, were intricately connected. To quote one of my favorite local trial lawyers, "They were as two hearts that beat as one" in defending this lawsuit.

Again, as stated at the outset, this Court seeks further guidance to comply with the Supreme Court's Order dated October 26, 1994, for this Court views the undeniable record in the *trial* court to be a judgment against *both* defendants for the *entire* sum of three million dollars ($3,000,000.00). Certainly, there has been no judicial action or ruling in the trial court in this case to cause any other interpretation by any court.

At no time prior to the entry of the attached ORDER by this Court did any party present any argument or cite any authority that the trial court should, or even could, apportion damages among joint tort-feasors at a *Green Oil* and *Hammond*, *supra*, hearing. A fortiori, no party presented any such argument or cited any authority to the *trial* court subsequent to the entry of said ORDER and while the trial Court still had jurisdiction of the subject matter. Of course, the court is well aware that damages are not apportioned among joint tort-feasors, and joint tort-feasors are jointly and severally

liable for the entire amount of damages and the plaintiff need not elect to seek damages from one or the other. *See Buchanan v. Collier*, 555 So.2d 134 (Ala. 1989). In this cause two tort-feasors acted jointly to produce indivisible injury so there can be no apportionment of damages.

This Court feels compelled to reaffirm its attached ORDER, as it does not propose to retreat from or retract its prior holdings and statements, although such was opined recently by one of the illustrious justices.

Respectfully submitted this the 4th day of November, 1994.

HARDIE B. KIMBROUGH,
PRESIDING JUDGE

FIRST JUDICIAL COURT
OF ALABAMA

APPENDIX E

UNION SECURITY LIFE INSURANCE COMPANY

v.

EVELYN CROCKER.

No. 1931672.

Supreme Court of Alabama

Nov. 21, 1997.

Appeal from Choctaw Circuit Court (CV-92-064)

On Application for Rehearing

BUTTS, JUSTICE.

APPLICATION OVERRULED.

ALMON, SHORES, KENNEDY, and COOK, JJ., concur.

HOUSTON, J., concurs specially.

HOOPER, C.J., and MADDOX and SEE, JJ., dissent.

HOUSTON, JUSTICE (concurring specially).

I did not vote in this case when this Court affirmed a $2,000,000 award against Union Security Life Insurance Company, *Union Security Life Ins. Co.* v. *Crocker*, 667 So.2d 688 (Ala.1995), judgment vacated, 116 S.Ct. 1872 (1996), because I recuse myself in cases involving Regions Bank (formerly First Alabama Bancshares), which had been a party in this case. On remand from the United States Supreme Court, the issue was limited to whether the punitive damages assessed against Union Security Life Insurance Company were unconstitutionally excessive; therefore, there was no reason for me to recuse myself.

Whether the trial court erred in directing the jury to return a general verdict was not an issue on the original submission of this case to this Court. It appears that there was no request that any verdict for the plaintiff be broken down into separate awards of compensatory damages and punitive damages, and that there was no objection to the form of the verdict requiring, in case of a verdict for the plaintiff, a combined compensatory and punitive damages

award. Therefore, I believe it was incumbent on this Court to resolve the excessiveness issue without a remand, based on established standards of review and established caselaw.

The invocation of our statutory authority to determine the proper amount of recovery and to affirm the judgment, subject to the plaintiff's filing of a remittitur of the amount in excess of the proper amount, is dependent upon our holding that the presumption of correctness of the jury verdict has been overcome by a clear showing that the amount of the verdict is excessive. It is also well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts and that neither the trial court nor this Court may substitute its judgment for that of the jury. *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala.1989).

In dealing with compensatory damages, the interest of the uncompensated victim must always be kept foremost in mind. When considering punitive damages, however, the defendant's right to fair punishment must be considered above the plaintiff's right to recover the fullest amount of punitive damages. *Wilson* v. *Dukona Corp., N.V.*, 547 So.2d 70 (Ala.1989), citing *Layman* v. *Hendrix*, 1 Ala. 212, 214 (1840), and *Tatum* v. *Schering Corp.*, 523 So.2d 1042, 1048 (Ala.1988) (Houston, J., dissenting). Accordingly, in a case such as this one, where the excessiveness *vel non* of a jury verdict presumably awarding both compensatory and punitive damages is an issue, the focus must be on the plaintiff with regard to the propriety of the compensatory damages award, and on the defendant with respect to the propriety of any assessment of punitive damages.

Applying these standards for reviewing the excessiveness issue in this case, I presumed, as did every other Justice on this Court, that the jury's general verdict included an award compensating the plaintiff. Because the plaintiff sought recovery for both economic loss and emotional distress, I had to further presume that the jury's compensatory award included damages for economic loss of around $16,222.61 (representing not only the $1,659.61 that the plaintiff and her husband had paid for the credit life insurance, but also the $14,563 outstanding balance on the loan, which the insurance policy was to have paid), as well as damages for emotional distress.

Recently, I authored an opinion in *First Commercial Bank* v. *Spivey*, 694 So.2d 1316 (Ala.1997), in which this Court upheld the jury's award of more than $400,000 in compensatory damages for emotional distress on the basis of the plaintiff's evidence of emotional distress arising from the defendant's fraudulent conduct that ultimately led to the foreclosure of the mortgage on the plaintiff's house. Based on that opinion, and on the fraud cases cited therein where this Court affirmed compensatory damages awards of well over $250,000 for emotional distress, see *Duck Head Apparel Co.* v. *Hoots*, 659 So.2d 897 (Ala.1995), and *Sperau* v. *Ford Motor Co.*, 674 So.2d 24 (Ala.1995), judgment vacated, --- U.S. ----, 116 S.Ct. 1843 (1996), on remand from the United States Supreme Court, [Ms. 1931591, September 5, 1997] --- So.2d ---- (Ala.1997), and on this Court's affirmance of the $250,000 award of compensatory damages for emotional distress in *Life Insurance Co. of Georgia* v. *Johnson*, [Ms. 1940357, August 15, 1997] --- So.2d ---- (Ala.1997), I concluded that the jury in this case could have awarded as much as $250,000 in damages to compensate the plaintiff for her economic loss and emotional distress and that such an award would not have been reduced by this Court, based upon the cases hereinbefore cited and others not cited. (There was not a foreclosure of the plaintiff's mortgage in this case. The foreclosure proceedings were halted, however, only after the plaintiff obtained legal counsel.) Assuming such an award of $250,000, which the evidence would support, that left a $750,000 punitive damages award approved by this Court; that award represented a 3:1 ratio of punitive damages to compensatory damages. This ratio is the benchmark against which I measure reasonableness. See *BMW of North America, Inc.* v. *Gore*, [Ms. 1920324, May 9, 1997] --- So.2d ---- (Ala.1997) (Houston, J., concurring in the result).

I would have preferred that the jury enter separate awards for compensatory damages and punitive damages. Ala.Code 1975, § 6-11-1. I believe that either party has a right to demand that the verdict form submitted to the jury require that. However, if no party objects to the verdict form submitted and the jury returns a general verdict, then I believe this Court must assume that the general verdict includes the maximum amount of compensatory damages that this Court would affirm.

(2)

No. 97-1331

Supreme Court, U.S.
FILED
MAR 17 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNION SECURITY LIFE INSURANCE COMPANY,

Petitioner,

v.

EVELYN CROCKER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

UNION SECURITY LIFE INSURANCE COMPANY,

Petitioner,

v.

EVELYN CROCKER

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

For the second time in two years, this case is again before this Court on the question of damages. On June 3, 1996, this Court granted certiorari and remanded the Alabama Supreme Court's prior judgment for reconsideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). *See* 116 S. Ct. 1872 (1996). On remand, the Alabama Supreme Court faithfully applied each of the punitive damages guidelines set out in *BMW* and reduced the damages award in this case — which had already been cut by a $2 million trial court remittitur — by an additional 50%.

Union Security continues to attack the judgment. Yet it does not even attempt to argue that the damage award in this case is excessive under the facts found by the Alabama Supreme Court. Instead, the petition for certiorari rests on (i) reckless and unfounded insults directed at the Alabama Supreme Court, which is wrongly accused of "open defiance" of this Court's decision in *BMW* (Pet. 19), and (ii) Union Security's quarrels with the

factual findings of the Alabama courts, together with a series of misstatements about the record that fly in the face of the maxim that the evidence is to be construed in favor of the verdict winner.

This is a case where state court judicial review has worked to the defendant's great benefit. The Alabama Supreme Court in the decision under review cut the punitive award by $1 million. The petition should be denied.

STATEMENT OF THE CASE

This case involves an intentional fraud by Union Security's agent, for which Union Security admits it is liable under the Alabama law of respondeat superior approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In addition to its vicarious liability, Union Security itself committed culpable acts that warrant punitive damages. Union Security adopted a deliberate corporate policy that facilitated the commission of fraudulent acts by its agents. Furthermore, it failed to provide its insureds with written copies of their policies. Such a failure made it impossible for the insureds to protect themselves against the agent's fraud.

1. *Union Security's Business.* Petitioner Union Security sells credit life insurance in conjunction with loans made by First Alabama Bank in Choctaw County, Alabama. Under this arrangement, Union Security, in exchange for a premium, pays off any outstanding loan balance in the event of the borrower's death. Union Security authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants. App. 2a; R. 302-03.[1]

---

[1] References to the Appendix to the Petition for Certiorari are styled "App. __." References to the Reporter's Transcript of the trial below are styled

Taylor testified that he received "a monetary payment or incentive connected with the sale of credit life insurance." R. 540.

For credit life policies in excess of $10,000, Union Security required a "Statement of Debtor's Physical Condition." App. 2a. This health statement authorized Union Security to obtain all information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, for purposes of evaluating or underwriting the application for credit life coverage. *Id.* The statement contained nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. As a matter of company policy, Union Security issued credit life coverage only if all nine boxes were checked "no." *Id.*

2. *The Crockers.* Coleman and Evelyn Crocker were residents of Choctaw County who had been married some 31 years. They were people of modest means who lived in a mobile home. Coleman had a history of heart problems and Parkinson's disease. He had heart by-pass surgery in 1984 and an angioplasty procedure in 1988. R. 565. He died in August 1991.

In October 1990, Evelyn called Taylor about taking out a $24,000 loan with First Alabama Bank. Union Security now asserts that, "[i]n conjunction with the loan, the Crockers decided to purchase credit life insurance." Pet. 5. But at trial Evelyn Crocker's testimony was that Taylor told her (falsely) that "we would be required to have credit life," and she replied that the Crockers would accept credit loan coverage. R. 572. "He said, You must have credit life to get this loan." R. 575. The Alabama Supreme Court found that the evidence showed that Taylor's fraud "induced [the Crockers] to obtain the credit life

---

"R. _." References to the Record of the clerk of the trial court are styled "Ct. R. _."

coverage." App. 21a.

3. *Taylor's Knowledge.* The Alabama Supreme Court found that "[t]here is evidence that Taylor knew that these health conditions" — Parkinson's disease and heart disease — "existed when Mr. Crocker and his wife applied to him for credit life insurance in conjunction with this home equity loan." App. 4a.

Union Security now claims that there "is a dispute of fact as to whether Taylor actually knew that Mr. Crocker indeed had suffered from heart disease." Pet. 6 n.6. Yet at trial it was undisputed that "during the years that Mr. Crocker suffered from heart disease and Parkinson's disease," App. 3a, the families had fished together, vacationed together, and dined in each other's homes. R. 492, 532-33. Taylor was a pallbearer at Coleman's funeral. R. 545. Mrs. Crocker testified that she told Taylor "a few times" about Coleman's heart disease and his angioplasty operation. R. 589. She testified that Taylor "asked me on several occasions inside of the bank how [Coleman] was doing." R. 591. "[O]nce a month" Evelyn would go into the bank and Taylor "always came out and spoke to me and he would say, 'How is Mr. Coleman today?'" R. 615. After she retained a lawyer, but before she filed suit, Taylor admitted to her that "he knew [Coleman] had had balloon surgery and everything." R. 592.

A First Alabama employee also testified that she specifically recalled a conversation in which Taylor had asked Evelyn Crocker "how Coleman was, did the procedure, his heart procedure that they had done, did it work this time" (R. 637), referring to the angioplasty performed in 1988. She further recalled on other occasions that Taylor had asked Evelyn if Coleman was doing better. R. 638. Another witness testified that Taylor admitted to him that he knew that Coleman had had heart surgery, undergone an angioplasty, and suffered from Parkinson's disease. R. 650-51. Ironically, Coleman

experienced noticeable tremors from Parkinson's disease on the very day that the application forms were signed. App. 21a.

The only contrary "evidence" was Taylor's self-serving claim in his direct testimony that, at the time he filled out the form, he had no recollection of Coleman's illness. R. 523, 544-45, 555. On cross-examination, Taylor retreated substantially from this testimony.[2]

4. *Taylor's Fraud Filling Out the Health Statement.* Union Security asserts that the evidence of Taylor's misconduct was "thin at best." Pet. 8 n.8. To the contrary: Taylor failed to request the Crockers to fill out the medical statement and failed even to ask them for medical information. Instead, he filled out the medical statement himself, R. 495, and falsified the information he put on the application. Taylor called the Crockers and told them that the papers relating to the loan — 10 to 12

---

[2] Q: [Y]ou can't swear under oath that your wife didn't tell you that Coleman Crocker had heart trouble. You can't tell us that, can you?
A: At what point in time are you talking about?
Q: Any time before Coleman Crocker died.
A: (No response.)
Q: You can't tell us that, can you?
A: No.
Q: You can't tell us that, and you knew he had the nervous disorder, didn't you?
A: (No response.)
Q: Fifteeen or twenty years you had been knowing that.
A. (No response.)
Q: Hadn't you?
A: Yes.

R. 559.

Q: You asked the Health Statement after you had known that he had a nervous condition for fifteen or twenty years and after your wife had told you he had a by-pass or a heart condition.
A: Yes.

R. 560.

documents in all — were ready for them to sign. R. 575. Taylor asked absolutely nothing of the Crockers' prior health history. R. 576, 577. "He said [to Evelyn Crocker], 'you are covered with credit life in case something were to happen to you or your husband,' and he said in the event something did, if one of us was to die, then our balance at the bank would be paid off." R. 575.

When asked at trial about whether he had questioned the Crockers regarding the health statement, Taylor replied: "No sir, because if he had answered 'YES' on any, I would have discontinued the credit life." R. 509. Taylor stated that, on the other hand, if all boxes were checked "NO," the bank and Union Security would have received "some money." R. 556-57.

As the Alabama Supreme Court found, "Taylor knew that he would receive a commission from the sale of credit life insurance to Mr. Crocker, even if a future claim for the benefits was denied." App. 4a-5a. The court further found:

> With this knowledge, Taylor deliberately precompleted for the Crockers the health disclosure statement on the Crockers' application form, marking "No" beside questions that asked if Mr. Crocker suffered from heart disease or certain other illinesses. *Taylor thus intentionally falsified information on the Crockers' life insurance application*, to secure a fraudulent appoval by Union Security. He did so knowing that the Crockers were relying on the coverage to pay off the loan and to prevent the foreclosure of their home mortgage in the event either of them died. He assured them they would receive coverage, and he collected his commission when they did, knowing that their benefits would be denied if his false representations on their applications were discovered after the fact.

Id. at 5a (emphasis added).

The court concluded that "[t]he evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage." App. 20a. In addition:

> There is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.

Id. at 21a.

5. *Union Security's refusal to pay.* After Mr. Crocker's death, Union Security refused to pay benefits on the credit life insurance policy, explaining that "[h]ad full disclosure been made at the time the Health Statement was completed coverage would not have been written on this loan." Ct. R. 311. The Alabama Supreme Court found that, "[w]ithout her husband's income, and without the benefits of the coverage for which she had paid premiums, Mrs. Crocker was unable to pay off the balance on her First Alabama loan." App. 3a. "On December

11, 1991, Taylor wrote Mrs. Crocker to inform her that, because of her default on the loan, First Alabama would foreclose the mortgage on her double-wide mobile home, which was collateral for the loan." *Id.* "The foreclosure was to take place on December 20, 1991, five days before the first Christmas that Mrs. Crocker would spend as a widow." *Id.* "The foreclosure proceedings were halted only after Mrs. Crocker obtained legal counsel." *Id.*

Union Security now claims that it "informed [Mrs. Crocker] that the portion of the premium attributable to Mr. Crocker would be refunded." Pet. 7. Yet at trial Union Security's own claims manager testified that he took no steps to ensure that a refund of the insurance premium was made. After Union Security denied the claim, it closed Mrs. Crocker's file. R. 344. Its claims manager testified that "I don't see anything referring to a refund of premium in here." *Id.* He stated that he didn't know anything about whether a refund was made, when it was made, what amount should have been refunded, or whether interest was paid. R. 345 ("I did not refund the premium, so I don't know if interest was paid or not"). Union Security alleged that it instructed First Alabama to refund the premium, but it never took any steps to ensure that the refund was actually carried out.

The only reason any refund was paid was the personal intervention of the President of First Alabama, Choctaw. R. 739-40. Even then, he acted only after the instant lawsuit was filed. R. 742-43. And he refunded only *half* the premium — the portion attributable to Mr. Crocker. R. 744.

REASONS FOR DENYING THE WRIT

I. THE PETITION IS PREMISED ON FACTUAL DISAGREEMENTS WITH THE STATE COURTS BELOW

The petition is based on Union Security's allegation that the conclusions of the Alabama Supreme Court were "inaccurate" (Pet. 13); that the Court "overlooked the facts" (Pet. 13 n.12); that there was "no record basis" for the Court's decision (Pet. 23), and it was not based on "an iota of evidence" (Pet. 14).

There are of course complete answers to every one of Union Security's attempts to debate the record evidence with the Alabama Supreme Court. But the salient point is more fundamental: Union Security's own argument demonstrates that certiorari is inappropriate in this case, for unless this Court is to engage in de novo review of every damages award to examine each defendant's plea that he or she was wholly innocent and that the damages are excessive, then review is entirely unwarranted here. This case involves nothing more than factual disputes about the application of settled legal principles to a specific factbound context.

Indeed, review is particularly inappropriate for a reason Union Security seeks to bury in a footnote (Pet. 14 n.14): at trial Union Security declined to request an itemized verdict separating punitive and compensatory damages. The Alabama Supreme Court did not proceed on the assumption that the entire $1 million represented punitive damages. At the denial of rehearing in the Alabama Supreme Court, Justice Houston explained that, in light of Union Security's procedural waiver:

> I presumed, *as did every other Justice on this Court*, that the jury's general verdict included an award compensating the

> plaintiff. . . . I concluded that the jury in this case could have awarded as much as $250,000 in damages to compensate the plaintiff for her economic loss and emotional distress, and that such an award would not have been reduced by this Court, based upon the cases hereinbefore cited and others not cited. . . . Assuming such an award of $250,000, which the evidence would support, that left a $750,000 punitive damages award approved by this Court; that award represented a 3:1 ratio of punitive damages to compensatory damages.

App. 45a-46a (Houston, J., specially concurring) (emphasis added).

Justice Houston made clear that his analysis was premised entirely on Union Security's procedural default at trial:

> I would have preferred that the jury enter separate awards for compensatory and punitive damages. Ala. Code 1975, § 6-11-1. I believe that either party has a right to demand that the verdict form submitted to the jury require that. However, if no party objects to the verdict form submitted and the jury returns a general verdict, then I believe this Court must assume that the general verdict includes the maximum amount of compensatory damages that this Court would affirm.

App. 46a.

The petition for certiorari simply fails to come to grips with this ground for upholding the award — the only opinion issued by the Alabama Supreme Court on rehearing and one which purports to describe the reasoning of the entire Court. Nothing in the petition remotely shows that a modest 3:1 ratio between punitive and compensatory damages would be unreasonable in this case.

II. THE DAMAGES AWARD IS NOT EXCESSIVE

Not only does this case involves the kind of factbound application of a settled legal standard that does not warrant this Court's review, but here the state court administered the legal standard correctly. In this case, the Alabama Supreme Court faithfully applied the *BMW v. Gore* guideposts, together with the factors approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

1. Reprehensibility. The Alabama Supreme Court found that Taylor "intentionally falsified information on the Crockers' life insurance application," App. 5a, defrauding them into buying a worthless policy. "He did so knowing that the Crockers were relying on the coverage to pay off the loan and to prevent the foreclosure of their home mortgage in the event either of them died. He assured them they would receive coverage, and he collected his commission when they did, knowing that their benefits would be denied if his false representations on their applications were discovered after the fact." *Id.* "When Mrs. Crocker, newly widowed, submitted her claim for benefits under the policy, Union Security denied it, leaving her with no means to pay her debt to First Alabama. She was threatened with foreclosure of her home mortgage, only five days before the first Christmas that she would spend without her husband of 31 years of marriage." *Id.* The Alabama Court therefore concluded that "Union Security's misconduct in this case was highly reprehensible," although the court allowed that it appeared to be "an aberration." *Id.* at 6a.

a. Union Security contends that there is "no evidence from which it could fairly be concluded that Union Security did anything wrong at all." Pet. 20. This claim is both irrelevant and a mischaracterization of the record.

First, under the doctrine of respondeat superior, as upheld by

this Court in *Haslip*, Union Security's argument is irrelevant. It can be held fully liable for punitive damages based on the intentional fraud of its agent, Sammy Taylor, even if it did nothing wrong itself. *See* Ala. Code § 6-11-27 (principal's liability in punitive damages for acts of agent).[3]

"[T]he legal basis for assessing punitive damages on respondent superior grounds is well-established." *Laughinghouse v. Risser*, 786 F. Supp. 920, 925 (D. Kan. 1992). Seventy years ago, this Court made clear that punitive damages "may be assessed against the employer who, as here, is personally without fault." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 114 (1927). "The principle of respondeat superior itself and the rule of liability of corporations for the willful torts of their employees extended in some jurisdictions, without legislative sanction, to liability for punitive damages, are recognitions by the common law that the imposition of liability without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law." *Id.* at 115.

This principle was reaffirmed in *Haslip*, where this Court upheld a punitive damages award of over $800,000 against an insurer whose agent was guilty of fraud, even though the award was more than four times the amount of compensatory damages and more than 200 times the out-of-pocket expenses incurred by the insured. In *Haslip*, the agent's wrongdoing was imputed to Pacific Mutual in full, over the insurer's objections that neither it nor its local manager was aware that the agent was collecting

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[3] The jury was properly instructed that, under Alabama law, it could impose punitive damages on Union Security if (1) Union Security "knew or should have known of the awareness of the agent . . . [and] continued to employ him or used his services without proper instruction with a disregard of the rights or safety of others"; or (2) it authorized or ratified his misconduct; or (3) "the acts of the agent were calculated to or did benefit the principal." R. 915-16.

premiums contrary to his contract; that Pacific Mutual had no notice of the actions complained of prior to the filing of the complaint in the litigation; that Pacific Mutual did not authorize or ratify the agent's conduct; and that the agent's contract with the company forbade his collecting any premium other than the initial one submitted with an application. *See* 499 U.S. at 12-13. This Court found that none of these defenses rendered the damages excessive.

By definition, a corporation held vicariously liable may well have done little affirmatively wrong itself. Yet in assessing whether the damages imposed against the principal are excessive, the conduct and state of mind of its agent must be imputed directly to the principal. That is the very nature of vicarious liability. *See, e.g., Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1224 (8th Cir. 1990) ("Because [the agent's] wrongful intent is imputed to [the principal], we hold that there is sufficient evidence of intentional wrongdoing to support the punitive damages award" against a challenge that the defendant's conduct was not reprehensible enough to justify $2 million award); *Laughinghouse v. Risser*, 786 F. Supp. at 928 ("The jury found [the principal] to be vicariously liable for [the agent's] conduct. In order to consider the acts of the agent, for which [the principal] as the master was liable even in punitive damages, the jury could consider evidence relating to the nature, extent and enormity of the wrong as well as the intent of the party committing it.").

Accordingly, Taylor's deliberate fraud and wrongful intent must be imputed directly to Union Security. The misconduct here was highly reprehensible, amounting to "acts of affirmative misconduct." and "trickery and deceit." *BMW v. Gore*, 116 S. Ct. at 1599, 1601.

Union Security claims that there is no evidence that "it had authorized [Taylor] to fill out Health Statements inaccurately."

Pet. 6 n.6. But few principals ever expressly direct an agent to commit misconduct. *See* W. Page Keeton, *et al.*, PROSSER AND KEETON ON TORTS § 70, p. 502 (5th ed. 1984) ("A master cannot escape liability merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable."). Here the evidence showed that Union Security authorized Taylor to fill out the Health Statements without regard to whether they were accurate, and Union Security adopted no safeguards to ensure that the Statements were accurate. The Alabama Supreme Court found that "Union Security issued insurance to Mr. Crocker without any meaningful knowledge of his medical, and it collected premiums from him until he died on August 28, 1991." App. 5a.

b. In the decision under review, the Alabama Supreme Court understood that the damages award could be upheld on the basis of Union Security's vicarious liability. The court found it unnecessary to discuss the ways in which Union Security was itself guilty of affirmative misconduct. But in its earlier decision — which the state court certainly never disavowed or abandoned, as Union Security incorrectly suggests (Pet. 13-14) — the court detailed that wrongdoing. The Alabama Supreme Court found that "Union Security does not issue a written policy to those applicants who are accepted for coverage." App. 19a. The trial court noted that "it was undisputed" that the Crockers never received "either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased." App. 31a. Thus, "[o]ne can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth in the Statement." *Id.*

Had Union Security issued a written policy to the Crockers,

Taylor's fraud might have been exposed. Indeed, Regulation No. 28 of the Insurance Commissioner of the State of Alabama requires that "[a]ll Credit Life Insurance sold shall be evidenced by a policy, certificate or statement of insurance, which shall be delivered to the insured borrower or purchaser. . . . Said policy, certificate or statement of insurance shall set forth the amount and term of the coverage, a brief description of the coverage, including any exceptions, limitations, or restrictions." Ct. R. 253-54. The trial court in this case rejected Union Security's argument that the regulation required merely that the policy be delivered to the group policy holder — here, First Alabama — and commented that the regulation "hasn't been complied with because there wasn't any delivery to each debtor insured under the policy." R. 811. Indeed, Union Security's claims manager testified at trial that he had "been made aware, possibly," of the company's violation of Alabama law. R. 433.

Union Security's witnesses claimed at trial that they had delegated the duty to First Alabama of supplying certificates of insurance to borrowers and purchasers like the Crockers. R. 326. Yet Regulation No. 28 does not provide for the delegation of duties. It imposes an obligation on the insurer to ensure delivery of certificates. In any event, Union Security is liable for the misconduct of its agent (First Alabama). Union Security's own claims manager acknowledged that, although Union Security's records reflected that the Crockers paid a premium for credit life, they never received anything in return: "In the form of a certificate, they did not." R. 328.

c. Union Security's policies facilitated Taylor's fraud in other ways as well. Prior to an application for credit life being approved, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement. R. 444. As the Alabama Supreme Court found, "Union Security does not examine the health records of

those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine 'after the fact' whether coverage should have been issued." App. 19a. The evidence showed that the great majority of claim denials result from post-claim investigation of the health statements. R. 334, 335.

Union Security goes so far as to claim that it "was the *victim*" of insurance fraud. Pet. 20 n.17. But Union Security's own figures show that it receives between 2,000 and 6,000 health statements per month (Pet. 3 n.4) — or 24,000 to 72,000 per year — but it pays only 7,000 claims annually. Pet. 4. The vast majority of insureds, in other words, pay the premiums and never make a claim under the coverage. Union Security thus derives a great benefit from maximizing the number of policyholders, since each individually is unlikely ever to make a claim. Union Security's policy of issuing insurance while failing to investigate health conditions allows agents to defraud consumers like the Crockers who sign up for credit life policies for which they are not qualified — and for which they would in fact later be disqualified for health reasons if they attempted to assert a claim within the first year of the policy (when the incontestability clause does not apply). Union Security reaps the benefits of premiums from defrauded customers like the Crockers, who receive nothing in return. The Alabama Supreme Court explained:

> As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. *The benefits from this type of transaction lie solely*

> *in favor of the insurance company and its agent.* The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement *could prevent situations like the one in this case.*

App. 26a-27a (emphasis added and internal quotation omitted).[4]

The record shows that, by employing lax screening procedures and maximizing sales of credit life insurance, Union Security maintains unusually profitable loss ratios. "[T]he loss ratios of Union Security with First Alabama through these four years [1988, 1989, 1990, and 1991] were, respectively, 20.6%, 21.1%, 16.3%, and 17.0%." App. 23a. Expert testimony established that a 50% loss ratio was typical for other companies and represented "a more reasonable balance between the insurer and the insureds." *Id.* The facts showed that Union Security's policy redounds enormously to its own profit and that, rather than being

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[4] Union Security's claim that considering this factor would somehow be "plainly unconstitutional" (Pet. 14 n.13) is puzzling. At all relevant times, fraud has been forbidden by Alabama law, *see, e.g.*, Ala. Code § 6-5-101 through § 6-5-104 (liability for fraud); Ala. Code § 6-11-20 (liability for punitive damages), and Union Security has been on notice that it is liable in punitive damages for the acts of its agent under certain circumstances, such as those obtaining here. Whether Alabama statutes were interpreted as prohibiting post-claim underwriting at the time of the fraud in this case is not the issue. The point is that, when Taylor *did* defraud the Crockers and when Union Security's lax procedures *facilitated* that fraud, those procedures could be considered in assessing Union Security's punishment. After all, the procedures employed by Pacific Mutual in *Haslip* did not contravene any Alabama statute.

a victim, it was a malefactor.

Finally, it is significant that Union Security took virtually no corrective action in response to the fraud in this case. In fact, Union Security's claims manager testified that Mrs. Crocker's claim was handled in "the normal way," R. 425; that he didn't see "anything wrong" with the way Union Security behaved, R. 425-26; and that no one was reprimanded, suspended, or received a citation as a result of the fraud. R. 427. Such lack of contrition made Union Security's misconduct all the more reprehensible.

d. Union Security next contends that there is insufficient evidence of mental anguish. Pet. 23. Union Security is wrong. At the time of the fraud, Mrs. Crocker was a 50-year-old woman who lived in a mobile home with her sixteen-year-old daughter. R. 562, 563. A disabled 25-year-old son lived nearby. R. 563. Mrs. Crocker worked part-time for the U.S. Postal Service. R. 564. Three weeks after her husband's death, Mrs. Crocker received a letter from Union Security — a company she "had never heard of," since it had never provided her with a written insurance policy, R. 580 — stating that "benefits are not payable" and her claim was being "investigated." R. 580. Mr. Taylor told her that "it looked like to him if it was investigated it should have been done when we took the loan out rather than after my husband died." R. 581. Ten days later, she received another letter misspelling her name and stating that Union Security would not pay benefits under the policy. R. 582. Mrs. Crocker told Mr. Taylor, "I need my money." R. 583. He advised her to retain a lawyer. R. 584.

Two months later, during the Christmas holiday season, Mrs. Crocker received a letter from the bank stating that her home mortgage loan payments were past due in the amount of $1,458.00 and threatening to refer the matter to the bank's attorneys unless she paid the past due amount within nine days.

R. 517-18, 584. At trial, Mrs. Crocker indicated that she understood the threat as involving foreclosure on her mobile home. R. 584. Mr. Taylor confirmed that he planned to tell the bank's lawyers to "initiate foreclosure proceedings" on Mrs. Crocker's home. R. 518.

Union Security tries to excuse this outrageous behavior by arguing that the bank could not really have evicted Mrs. Crocker under Ala. Code 1975 §§ 35-10-13, 35-10-16, because it would have been required to publish a foreclosure notice for three consecutive weeks. Pet. 21 n.18. Of course, Mrs. Crocker had no such knowledge of the details of Alabama mortgage law, nor apparently did Mr. Taylor. Their trial testimony indicated that the threat of foreclosure was intended to be real and was understood as such. The statute now cited by Union Security after the fact did not diminish by one iota the mental anguish suffered by Mrs. Crocker. Indeed, the statute simply shows that the threats of foreclosure were illegal as well as mean-spirited.

Union Security's further argument that the threat of foreclosure abated when Mrs. Crocker retained counsel, borrowed money, and began making the mortgage payments anew (Pet. 21 n.18) is equally beside the point. That the threat of losing her home did not in the end materialize hardly diminishes the mental anguish she suffered in the interim. And Union Security can hardly claim credit for Mrs. Crocker's self-help actions or the generosity of her trial counsel.

Union Security complains that there was no evidence that Mrs. Crocker was hospitalized, consulted a doctor or therapist, or was prescribed medication for her mental anguish. Pet. 22-23. But there is no federal constitutional reason why such evidence was necessary. The Alabama courts were surely entitled to draw on common human experience to infer that the mental anguish suffered by a 50-year-old recent widow of modest means facing

the imminent loss of her home was self-evident.[5] Under Alabama law, the assessment of damages for mental anguish "is left to the sound discretion of the jury, subject only to review by the court for a clear abuse of that discretion." *First Commercial Bank v. Spivey*, 694 So. 2d 1316, 1326 (Ala. 1997). As the trial court found, "[o]bviously, the jury, drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants." App. 30a-31a. The Alabama Supreme Court considered "the emotional and mental toll the wrongful conduct took upon her; that conduct led to her fight over insurance and caused her to face the threat of losing her home in foreclosure proceedings only months after losing her husband." App. 7a.

e. Union Security contends that "no fault could be laid at Union Security's door" for the threat of foreclosure because Taylor was "wearing solely his bank officer hat" when he made those threats to Mrs. Crocker. Pet. 21-22. Union Security points to no evidence in the record to substantiate its claim. In any event, Union Security is culpable because, at the time the credit life policy was extended, Taylor knew "that the Crockers were relying on the coverage to pay off the loan and prevent the foreclosure of their home mortgage in the event either of them died." App. 5a. This knowledge is of course to be imputed to the principal, Union Security.

It is plainly reasonably foreseeable that the harm in a case like this will not merely be financial: when credit life policies are

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[5] Mrs. Crocker testified that the events precipitated by the fraud caused her to be "upset," R. 587, but petitioner successfully objected to this testimony as "call[ing] for a mental operation and self-serving declaration on the part of the witness." R. 587. It is thus inconsistent for Union Security now to demand additional direct evidence of mental anguish, when it resisted such evidence at trial.

extended to persons of modest means — with the borrowers' residence as sole collateral — there is a substantial risk of catastrophic consequences if the borrowers are defrauded. As the trial court commented, "[t]he harm which resulted in this case . . . not only was [that] the loan, which was secured by a loan on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed." App. 33a. An insurance company in the business of selling credit life necessarily understands that, where policyholders are defrauded and deprived of the expected benefit of the bargain, and where the loan cannot be repaid, there is a possibility of grievous injury.

2. Ratio between punitive damages and actual harm. The Alabama Supreme Court explained that "we do not consider the compensatory damages to be based solely upon economic loss." App. 6a. Instead, "we have thoroughly reviewed the compelling evidence of Mrs. Crocker's emotional and mental distress over Union Security's misconduct, as well as her economic loss, in determining the possible ratio of punitive damages to compensatory damages." *Id.* The court noted that, in another recent case, a compensatory award of $500,000 was found appropriate for "mental and emotional distress arising from the defendant's fraudulent conduct that led to the foreclosure of the mortgage on the plaintiff's home." *Id.* at 7a. As Justice Houston elaborated, in this case Union Security's procedural default at trial means that the compensatory damages for mental anguish must be assumed to be $250,000, producing a modest 3:1 ratio between punitive and compensatory damages. App. 46a.

Thus, this case does not present any of the ratio concerns that this Court has encountered in the past. *See, e.g., BMW v. Gore*, 116 S. Ct. at 1603 (500:1 ratio "raise[s] a suspicious judicial eyebrow") (internal quotation omitted) ; *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443, 459-61 (1993)

(upholding 526:1 ratio between punitive and compensatory damages); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (upholding 200:1 ratio between punitive damages and out-of-pocket expenses); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (upholding ratio of punitive to compensatory damages over 100:1).

Instead, this case involves the same 3:1 ratio that this Court has noted is commonplace in federal statutes such as the antitrust and RICO laws. *See BMW v. Gore*, 116 S. Ct. at 1602 n.33. In fact, this case involves the kind of injury that this Court has indicated would warrant an unusually high ratio of punitive to compensatory damages: it involves "a particularly egregious act [that] has resulted in only a small amount of economic damages." *Id.* at 1602.

The Alabama Supreme Court specifically rejected Union Security's argument (recycled in its Petition) that Mrs. Crocker's economic losses fully reflected any harm she had suffered: "It is important to recognize that this economic injury was catastrophic for Mrs. Crocker in the wake of her husband's death; without his income to help make the loan payments to First Alabama, those benefits were all she had to keep from losing her home to foreclosure." App. 6a. Like other courts, the Alabama Supreme Court has repudiated Union Security's apparent view that "compensation" must be limited to solely economic damages. *See, e.g., Winn Dixie of Montgomery, Inc. v. Colburn*, 1998 WL 5313, *3 (Ala. Feb. 6, 1998).

Indeed, under *BMW* the nature of the damages in this case would warrant an even higher ratio than usual between punitive and compensatory damages. As the Alabama Supreme Court explained, the non-economic losses suffered by Evelyn Crocker — a woman of modest means — justify a high ratio:

The United States Supreme Court in *BMW* held that an

> economic loss to the plaintiff in that case, a well-to-do medical doctor, did not support a large punitive damages award; however, the Supreme Court was careful to point out that economic injury inflicted upon the "financially vulnerable" is an entirely different concern and "can warrant a substantial penalty." 116 S. Ct. at 1599. Where, as here, the economic harm could devastate its target, this is an especially serious consideration to be weighed against the amount of damages awarded. The Supreme Court also recognized in *BMW* that "[a] higher ratio [of punitive damages to compensatory damages] may . . . be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm [is] difficult to determine." 116 S. Ct. at 1602.

App. 6a-7a.

III. THE ALABAMA SUPREME COURT HAS NOT "DEFIED" THIS COURT'S MANDATE IN *BMW*

Union Security repeatedly raises the highly misleading charge that the Alabama Court has "affirmatively **refused** to apply the third *BMW* guidepost" and has "defied this Court's decision in *BMW*." Pet. 2 (emphasis in original); *see also id.* at 17 ("flagrantly flouted"); *id.* at 18 ("not heeded this Court's mandate"); *id.* at 25 ("flatly refused to apply the third *BMW* guidepost"); *id.* at 26 ("cavalier rejection of the third *BMW* guidepost").

This accusation is utter nonsense and highly insulting to the highest court of a sovereign State. Since the decision in *BMW*, the Alabama courts have faithfully applied the three guideposts outlined by this Court to review the excessiveness of punitive damage awards, supplemented by additional factors established

in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), and Ala. Code 1975, § 6-11-23(b).[6]

The *Hammond/Green Oil* factors show that the Alabama Supreme Court has gone *beyond* this Court's mandate in *BMW*. In this case, for example, the court cited two of the *Green Oil* factors — the financial position of the defendant and the cost of litigation— as important reasons to reduce the damage award. App. 8a-9a.

Post-*BMW* review of damage awards by the Alabama Supreme Court has been stringent:

• In this very case, the court cut the damage award by $1 million, or 50%.

• In the *BMW* case itself, the Alabama court reduced a $2 million award by 97.5% to $50,000. *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (Ala. May 9, 1997).

• In *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524 (Ala. Aug. 15, 1997), the Alabama Supreme Court reduced a punitive award by 40%, from $5 million to $3 million.

• In *Hillcrest Center, Inc. v. Rone*, 1997 WL 707069 (Ala. Aug. 1, 1997), the court reduced a punitive award of $130,000 — which had already been remitted by the trial judge from the jury's initial award of $200,000 — by a further 28%, to the sum of $96,000.

• In *American Pioneer Life Ins. Co. v. Williamson*, 1997 WL

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[6] The *Hammond-Green Oil* factors further constrain punitive awards, and they were specifically approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Nothing in *BMW* displaced them. Moreover, in his concurrence in *BMW*, Justice Breyer, joined by Justice O'Connor and Justice Souter, discussed these factors as a means of constraining damage awards. 116 S. Ct. at 1605-07 (concurring opinion). It was not the *Green Oil* factors themselves, but the particular application of them in the *BMW* case, that Justice Breyer found objectionable.

545880 (Ala. Sept. 5, 1997), the court reduced a $3 million punitive award by 75% to $750,000.

• In *Ford Motor Co. v. Sperau*, 1997 WL 545878 (Ala. Sept. 5, 1997), the Alabama Supreme Court reduced a punitive award by 70%, from $6 million to $1.792 million.

• In *Talent Tree Personnel Services, Inc. v. Fleenor*, 1997 WL 566228 (Ala. Sept. 13, 1997), the court reduced a punitive award from $2 million to $1.5 million.

• In *Strickland v. Liberty National Life Ins. Co.*, 1998 WL 57759 (Ala. Feb. 13, 1998), the court affirmed the reduction of a punitive award by over 99%.

Thus, the Eleventh Circuit has concluded that, "[s]ince *BMW*, the Alabama Supreme Court has shown itself willing and able to follow the Supreme Court's guidelines for ensuring that Alabama punitive damage awards satisfy constitutional constraints. . . . Indications are that the *BMW* decision has ushered in a new era for punitive damages in Alabama." *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 129 F.3d 1258, 1264 (11th Cir. 1997).

In this case, Union Security accuses the Alabama Supreme Court of refusing to apply the third *BMW* guidepost — statutory penalties for comparable misconduct. That accusation is utterly devoid of merit. In *BMW v. Gore*, this Court considered that the "maximum civil penalt[ies]" "that could be imposed" on comparable misconduct in order to ensure that the punitive award was consistent with "'legislative judgments concerning appropriate sanctions for the conduct at issue.'" 116 S. Ct. at 1603 (citation omitted).

At the outset, there can be no question that the 3:1 ratio between punitive and compensatory damages in this case is fully supported by legislative enactments in Alabama. Alabama has specifically provided a private treble damages remedy for victims of fraud: up to three times any actual damages, in the court's discretion, plus attorneys' fees. *See* Ala. Code 1975 § 8-19-

10(a)(2) and (3). A savings clause in the statute provides that the remedies under the Act do not displace remedies for fraud, misrepresentation, deceit, or suppression that are available under the common law, statute, or otherwise. *Id.* at § 8-19-15. Astonishingly, Union Security does not even cite this statutory provision in its certiorari petition. Thus, the ratio between punitive and compensatory damages in this case is fully consistent with the judgment of the Alabama legislature, and the award in this case thus plainly passes muster under the third *BMW* guidepost.

Union Security ignores this analysis and instead focuses its argument on language in the Alabama Supreme Court's opinion, rather than its judgment. But "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Further, Union Security misreads the Alabama court's opinion. The state court did not treat the third *BMW* guidepost as optional. Instead, it explained that "[a] third factor we *must* consider in determining whether the punitive damages award was excessive is the relationship of the punitive damages award to the civil or criminal penalties that could be imposed for comparable misconduct." App. 7a (emphasis added). Indeed, the Alabama Supreme Court has applied that factor to reduce punitive awards. *See, e.g., Talent Tree Personnel Services, Inc. v. Fleenor*, 1997 WL 566228, *11 (comparing penalties under fraud statute, Ala. Code 1975 § 13A-8-3).

In applying the third guidepost in this case, the Alabama court explained that "the maximum statutory sanction against insurance fraud in this state is meager" and does not provide a "'meaningful'" benchmark for reviewing damages claims. App. 7a-8a. This language reflects the recognition that the State of Alabama has decided to police insurance fraud through the tort system rather than via administrative regulation. *See Life*

Insurance Co. of Georgia v. Johnson, 701 So.2d 524, 531 (Ala. 1997) ("[T]he Alabama Insurance Code does not provide strong sanctions for insurance fraud. 'Alabama citizens who become the victims of fraud have little recourse other than through litigation. . . . [T]he State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have. Punitive damages have historically been part of the remedy for such victims . . . .'") (citation omitted).

Thus, the Alabama Supreme Court simpy recognized that the statutory sanction cannot be applied blindly, in a vacuum, without proper concern for the legislative purpose. This hardly represents "defiance" of *BMW*; in fact, it is perfectly consistent with *Haslip*, where this Court upheld a punitive damages award which greatly exceeded the fine that could be imposed for insurance fraud under Alabama law. This Court found the comparison between the punitive award and the statutory fine to be less than meaningful, because "[i]mprisonment . . . could also be required of an individual in the criminal context." 499 U.S. at 23.

There is even greater reason to respect the decision of a State's highest court as to the relevance of the State's own statutory enactments. How States allocate functions among the various branches of state government are unquestionably matters of state law. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6, 463 (1981); *id.* at 479 (Stevens, J., dissenting). Alabama is free to use its judiciary, rather than an administrative agency, as the primary regulator of insurance fraud. The States themselves are not bound by the federal doctrine of separation of powers, and nothing in the Constitution dictates how States must distribute their governmental powers. *E.g., Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring).

Accordingly, the Alabama Supreme Court was under no federal constitutional compulsion to make legislatively prescribed penalties for insurance fraud the decisive factor in its excessiveness analysis. However, the Alabama court *did* fulfill the command of *BMW v. Gore* by ensuring that the damage award was consistent with "'legislative judgments'" (116 S. Ct. at 1603 (citation omitted)), for the State of Alabama's decision to regulate insurance fraud through the tort system rather than administratively is one in which the legislature has acquiesced.

IV. FURTHER REVIEW OF THIS MUCH-PROLONGED CASE WOULD BE INAPPROPRIATE

This Court has already remanded this case once for reconsideration in light of *BMW v. Gore*. There is no reason for further delay. Union Security has already had *eight* separate opportunities to challenge the judgment before the Alabama courts: (1) an initial remittitur hearing before the Circuit Court for Choctaw County, Alabama, in which the court reduced the punitive award by 40%; (2) a subsequent proceeding before the circuit court, after a co-defendant settled with the respondent; (3) a full appeal on the merits before the Alabama Supreme Court; (4) a rehearing petition in the first appeal; (5) a denied application for stay in the first appeal; (6) plenary consideration before the Alabama Supreme Court in light of *BMW v. Gore*, on remand from this Court; (7) a second rehearing proceeding; and (8) a second denied application for stay.

There is a need for finality and closure, both for the litigants and for the state courts of Alabama, which have diligently implemented this Court's directive in *BMW v. Gore* and which should be allowed to function without undue interference.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNION SECURITY LIFE INSURANCE COMPANY, PETITIONER

v.

EVELYN CROCKER, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

We contended in the petition that, in an evident effort to salvage as much as possible of the judgment in this case, the Alabama Supreme Court performed major surgery on *BMW*. The certiorari petition in *Ford Motor Co. v. Sperau,* No. 97-1391 (filed Feb. 24, 1998) shows that this is not an isolated problem. Respondent here claims (Opp. 9) that the Alabama Supreme Court's dismantling of *BMW* should be immune from scrutiny unless this Court is prepared "to engage in de novo review of every damages award to examine each defendant's plea that he or she was wholly innocent and that the damages are excessive." This is fatuous. By granting one petition, the Court does not obligate itself to grant every other petition on a similar subject. The question always is whether review in the particular case will illuminate the law in important respects or is needed to maintain judicial discipline.

Moreover, few cases involve the kind of insubordination exhibited here — outright refusal to apply the comparative fines guidepost; evasion of the ratio guidepost by indulgence of a post hoc, foundationless assumption that the jury found substantial mental anguish damages (which, to the extent they exist at all, were caused by the bank and have been more than satisfied by the bank's post-trial payment of $1 million); and dilution of the reprehensibility guidepost by abandonment of any pretense of gauging the ***degree*** of reprehensibility of the defendant's conduct. Review is warranted to ensure that the Court's mandate to reconsider this case in light of *BMW* is not flouted in this way and that the lower courts perceive no weakening of this Court's commitment to "the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides" (*BMW,* 116 S. Ct. at 1609 (Breyer, J., concurring)).

Putting to one side the deleterious effect of declining to correct the Alabama Supreme Court's refusal to heed this Court's "admonition" (Pet. App. 12a (Hooper, C.J., dissenting)) and continued failure to apply the relevant factors in a way that will produce predictable, non-arbitrary results (*id.* at 15a (See, J., dissenting)), this case is a particularly good candidate for review because it affords the Court the opportunity to continue the didactic process begun in *BMW* by providing needed guidance on such issues as (i) the interplay between common law principles of vicarious liability and the constitutional requirement that punishment

be related to culpability; (ii) the determination of when a punitive award is excessive in relation to actual and potential injury; (iii) the extent to which courts are free to disregard legislatively established fines because they consider them to be "meager"; and (iv) when it is justifiable to permit a punitive exaction that is many times any profit conceivably derived from the alleged misconduct.

ARGUMENT

For all her righteous defense of the Alabama Supreme Court (*e.g.*, Opp. 23), respondent does not even attempt to explain why a punishment of (at least) $750,000 is warranted in a case of vicarious liability for an isolated act that deceived Union Security itself and that could have benefitted it, if at all, by no more than a few hundred dollars. Respondent's assertion (Opp. 11) that the Alabama Supreme Court "faithfully applied" the *BMW* guideposts is nothing more than empty lawyer's rhetoric.[1]

1. *Reprehensibility.* Respondent ignores the fact that Taylor's tort was an isolated incident. She ignores the absence of evidence of any deliberate misconduct on Union Security's part. She ignores the "absence of a history of noncompliance" and hence the absence of a "basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance" (*BMW*, 116 S. Ct. at 1603). The arguments she does make rely on inaccurate facts and, in any event, do not explain why this vicariously liable defendant/victim should suffer a penalty upwards of $750,000.

a. Respondent first argues (Opp. 11-12) that our contention that Union Security did nothing wrong is "irrelevant" because under *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), Union

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[1] Citing the remittiturs in this and several other cases (Opp. 24-25), respondent asserts (Opp. 24) that the Alabama Supreme Court in fact has been engaging in "stringent" review of punitive damages awards after *BMW*. But as the petitions in this case and *Ford* (cited by respondent at Opp. 25) amply demonstrate, the presence of a substantial remittitur in no way means that the review was "stringent" or the remittitur adequate. We are confident that if the Court reads the other decisions cited by respondent — particularly *American Pioneer* and *Talent Tree* — the inadequacy of the review afforded by the Alabama Supreme Court will be clear.

Security may be held "fully liable" for punitive damages under the doctrine of *respondeat superior*.[2] But the question in those cases was whether a defendant can constitutionally be ***liable*** for punishment under a theory of *respondeat superior*. See *Haslip*, 499 U. S. at 15; *Yeldell*, 274 U.S. at 115. In answering that question in the affirmative, the Court did not say that the fact that the defendant itself committed no wrongdoing should be ignored in reviewing the amount of the punishment. As we pointed out in the petition, at least one Justice has since indicated that cases of vicarious liability are distinguishable from, and generally warrant lower punishment than, cases involving misconduct of the defendant's management. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring).[3]

Respondent apparently recognizes no distinction between liability and amount of punitive damages. In her view, a principal may be subject to sky's-the-limit punitive damages, so long as the agent's conduct is egregious — even if the agent's conduct is *ultra vires* and even if that conduct was more likely to harm the principal than benefit it. This is a dubious proposition indeed, and serves only to highlight the appropriateness of this case for addressing the important and recurring issue of the proper measure of punitive damages in cases of vicarious liability.

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[2] In attempting to portray Taylor as an egregious wrongdoer, respondent takes unwarranted liberties with the record. For instance, she suggests (Opp. 3) that she agreed to purchase credit life insurance only after Taylor told her that she had to. In fact, however, respondent herself testified that she wanted credit life insurance and that she had it on her other loans. R. 572-573. Even more misleading is the insinuation (Opp. 6) that Taylor admitted that he did not ask the Crockers the health questions because he knew that a "yes" answer would result in denial of coverage. What Taylor actually said is that he was sure that he ***did*** ask the questions and that the ***Crockers*** answered no to them all because otherwise Taylor would have "discontinued the credit life [application]." R. 508-509. See also R. 504-506, 522.

[3] Moreover, the present case is distinguishable from *Haslip* because here, unlike in *Haslip*, the wrongdoer simultaneously and primarily served a separate, more culpable, master — the bank — that stood to profit from his misconduct.

b. Respondent admits (Opp. 14) that the Alabama Supreme Court's remand decision rests entirely on vicarious liability for Sammy Taylor's *ultra vires* conduct. No doubt uncomfortable with the rationality of relying on the doctrine of *respondeat superior* to support a punishment of the magnitude involved here, however, she claims (*ibid.*) that, in its initial opinion, the Alabama Supreme Court found that Union Security was guilty of what she labels "affirmative misconduct." But there was good reason for the court to abandon these alleged findings on remand, when they were demonstrated to be both legally and factually flawed. Although it should not be necessary for us to refute assertions that were implicitly rejected by the court below, we address them briefly to eliminate any doubt regarding the basis of liability in this case.

Respondent leads off by noting (Opp. 14-15) that Union Security does not issue policies to its covered debtors, which, she asserts, makes it easier to deceive insureds about the consequences of signing an inaccurate Health Statement. Respondent further contends that Union Security's practices were in violation of Alabama's insurance regulations. These claims are flatly wrong, both legally and factually.

The law is clear that when, as here, the policy is a ***group*** policy, the insurer may issue the policy itself to the group policy holder — here, First Alabama. See ALA. INS. REG. NO. 28, § II(C)(1). Because the insurer has no direct relationship with the covered debtor, state law directs the insurer to provide the creditor with certificates of insurance, which the creditor in turn is to give to its insured debtors. ALA. CODE § 27-18-8.[4] The record is unequivocal that Union Security supplied certificates of insurance to First Alabama, and that, unbeknownst to Union Security (and in

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[4] Respondent misrepresents the record in claiming (Opp. 15) that the trial court held that Union Security had the obligation under state law to deliver the certificates to covered debtors. During the charge conference, the trial court said to Union Security's counsel: "I'm not saying you may not have — may not have complied with [the Alabama statute], but it hasn't been complied with because there wasn't any delivery to each debtor insured under the policy." R. 811. Plainly, the import of this statement is that First Alabama—Choctaw, not Union Security, had breached the state-law delivery obligation.

direct contravention of its expectations (see R. 326-327, 448) as well as those of First Alabama (see R. 746-747)), the president of First Alabama—Choctaw made the ***unilateral*** decision not to send certificates of insurance to covered debtors (R. 747-748). In short, Union Security complied fully with Alabama law, and the actions of its co-defendant do not show *mens rea* on Union Security's part.

Ultimately recognizing the weakness of her claim of affirmative misconduct relating to non-delivery of the certificate of insurance, respondent falls back on the assertion that First Alabama was Union Security's agent. Opp. 15. Needless to say, that argument confirms our contention that the punishment cannot be justified by reference to Union Security's own conduct. And where, as here, the agent acted out of its own self-interest, with deception and disloyalty toward its principal, and has been punished for its misconduct, no rational purpose can possibly be served by severely punishing the otherwise innocent principal/victim.

Respondent next attempts to revive the Alabama Supreme Court's abandoned attack on "post-claim underwriting," asserting (Opp. 15-16) that "[p]rior to an application for credit life being approved, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement"[5] and that "the great majority of claim denials

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[5] It warrants reiterating that, even before Union Security had any reason to know that Mr. Crocker had signed an inaccurate Health Statement, it revised the form to warn specifically that "[u]ntruthful answers may result in denial of claims." C. 1919. The assertion that Union Security undertook "no safeguards whatsoever" is thus totally false. And quite apart from any warning, one would think that relying on the applicant to review the form — which is simply a one-page list of medical conditions with "Yes" and "No" boxes — and sign it only if it is accurate should be an adequate safeguard against inadvertent or deliberate errors on the part of the agent. The only individuals who would not be fully protected by this safeguard are those who either knowingly make false statements on their applications or carelessly sign applications containing false statements written in by their agent. Given the number of applications submitted every year, it is hardly surprising that the Alabama legislature and insurance regulators have not required insurers to check the accuracy of every application merely to protect the tiny fraction of individuals who fall

result from post-claim investigation of the health statements." Unlike the court below, respondent appears oblivious to the fact that, both at the time Union Security issued coverage to the Crockers and even now, Alabama positive law ***authorized*** post-claim underwriting.[6] She also ignores the undisputed testimony that Union Security pays over 99% of the claims it receives — a fact that vitiates her claim (Opp. 17) that "by employing lax screening procedures" Union Security has achieved "unusually profitable loss ratios"[7] and, at the same time, supplies the explanation for why post-claim underwriting is an efficiency-enhancing, cost-containing practice that should be encouraged, not punished.

Respondent asserts elsewhere in her opposition (at 2) that Union Security "adopted a deliberate corporate policy that facilitated the commission of fraudulent acts by its agents." As her failure to

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in these groups.

[6] Respondent professes to find "puzzling" our contention that basing punishment on an after-the-fact condemnation of post-claim underwriting would violate Union Security's due process right to fair notice. Opp. 17 n.4. However, because at the time of the conduct (and even now) Alabama positive law affirmatively permitted post-claim underwriting, it is plainly unconstitutional to punish Union Security even one dime for engaging in that practice. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.").

[7] Although respondent's "profit" argument is misguided for the reason mentioned in the text, it is in any event clear that the loss ratios she cites bear no discernible relation to profits, for they take no account of the cost of selling and administering the insurance. Moreover, respondent has never shown (and could not show) a causal link between Union Security's loss ratios and its practice of deferring investigation until after a suspicious claim is made. If Union Security were to investigate the accuracy of every Health Statement before issuing coverage, that would increase its costs, which in turn would be passed on to its insureds in the form of higher premiums. Ironically, this would make Union Security's loss ratios even ***lower***, because those ratios measure only the percentage of premium revenues paid out in claims and take no account of the cost of generating those premiums.

cite anything for this assertion suggests, there is not a whit of evidence that Union Security had such a policy. Nor was there evidence that Taylor or any other agent ***ever*** had engaged in a fraudulent act other than the one charged here. Indeed, as the trial court and Alabama Supreme Court both repeatedly observed, the alleged fraud on Taylor's part was "an isolated incident."

Respondent also misleadingly states (Opp. 8) that Union Security "took no steps to ensure that a refund of the insurance premium was made." It is undisputed, however, that Union Security instructed First Alabama—Choctaw to refund the premium. R. 346-347, 739. The ***bank*** may have been negligent in failing to carry out its responsibility, but that hardly constitutes "affirmative misconduct" on the part of Union Security.

Finally, citing the fact that Union Security did not discipline Taylor, respondent argues (Opp. 18) that Union Security's "lack of contrition" makes its conduct "all the more reprehensible." Of course, Taylor was the bank's employee, and was Union Security's agent only in the most technical sense. In any event, the fact that Union Security chose to believe an individual with an otherwise unblemished record is nothing more than a judgment call and is hardly the stuff of a near seven-figure punishment.

c. Like the Alabama Supreme Court, respondent asserts (Opp. 18-20) that the conduct in this case was inherently reprehensible because it threatened her financial security, causing her mental anguish. But unless the denial of an insurance claim is *per se* reprehensible, this argument affords no basis for characterizing Union Security's conduct as reprehensible at all, let alone heinous enough to warrant the large punishment at issue here. All Union Security did was to deny a claim under a policy procured by fraud; even accepting that the Crockers were innocent co-victims of the fraud and that the misconduct was (unbeknownst to Union Security) that of the bank's officer, Union Security's conduct was entirely proper in the circumstances.

The source identified by the court below for respondent's alleged mental anguish was the ***bank's*** letter threatening to send the file to its lawyers. Union Security had no role in drafting that letter or in the decision to send it shortly before Christmas. Thus, any

mental distress caused by the bank's unilateral action cannot logically make Union Security's conduct more reprehensible.[8]

2. *Ratio*. Aside from repeating the Alabama Supreme Court's analysis, respondent has nothing to say about the ratio guidepost. In particular, she makes no effort to identify what she and the court assert to be the "compelling evidence of Mrs. Crocker's emotional and mental distress" (see Opp. 21). As we explained in the petition (at 22-23), there is no such evidence.[9]

Respondent also does not quarrel with the premise (see Pet. 23) that the verdict may not be sustained on the basis of facts not before the jury. She instead asserts (Opp. 20) that no facts were needed because her distress was "self-evident." While Alabama may be free to allow juries to award ***some*** amount of compensation for "self-evident" mental distress, the assumption that ***this*** jury awarded the ***largest*** amount of such damages that would be legally tolerable — $250,000, according to Justice Houston — without the benefit of any evidence of such distress is untenable. It is especially inappropriate here, where the conduct that allegedly caused the bulk of any distress was the independent, intervening act of the bank in its debt collection effort.

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[8] Respondent asserts (Opp. 20) that there is no evidence to "substantiate" our "claim" that Taylor was not acting for Union Security when he sent her the letter urging her to clear the arrearage — a matter in which Union Security had no interest whatever. But the burden of proof was on respondent, not Union Security. If there were any evidence to support the illogical proposition that creditors act on behalf of insurers when seeking to collect on overdue loans, it was up to respondent to adduce it.

[9] Respondent asserts (Opp. 20 n.5) that it is "inconsistent" for us to make this argument having succeeded in preventing her from making self-serving statements about her "mental operation[s]." But had she actually suffered any significant degree of mental anguish, there were ways for her to establish that. For example, if she had suffered from loss of sleep or eating problems as a consequence of this experience, she could have so testified; such testimony does not involve simply "mental operation[s]." Similarly, if her distress had required her to consult a doctor or therapist, or to take prescription medication, nothing would have prevented her from telling the jury.

Finally, respondent ignores our contention (Pet. 23-25) that the ratio analysis does not end with a comparison of the punitive damages to whatever inflated compensatory award the state courts ultimately uphold, but also includes a comparison with the hard economic damages. Here that comparison reveals a gigantic disproportionality.

3. *Legislatively established penalties for comparable misconduct.* Respondent's argument regarding this guidepost is as wrongheaded as the Alabama Supreme Court's refusal to apply it. Respondent argues (Opp. 25-26) that the punishment in this case is "fully supported" by the treble damages remedy provided under Alabama's Deceptive Trade Practices Act (DTPA) and takes us to task for failing to cite the DTPA in our petition. But the DTPA does not apply to insurance transactions (ALA. CODE § 8-19-7(3)) for the obvious reason that they are specifically regulated under the Insurance Code. Moreover, even assuming applicability of the DTPA and accepting *arguendo* that the private remedy (as opposed to the Act's $2,000 administrative fine) is the appropriate referent for purposes of this inquiry, that treble damages remedy in no way supports the near seven-digit punishment authorized by the Alabama Supreme Court. In the very case cited by respondent, the Alabama Supreme Court computed the DTPA treble damages remedy using only the "actual economic damage" found by the jury, not the plaintiffs' overall compensatory award, which included mental anguish damages. See *Ford Motor Co. v. Sperau*, 1997 WL 545878, at *12 (Ala. Sept. 5, 1997). Thus, the DTPA's treble damages provision suggests an award in the range of $50,000, not the $750,000 to $1,000,000 awarded here; the DTPA accordingly undermines rather than supports the result below.

Respondent also defends the Alabama Supreme Court's refusal to apply the third *BMW* guidepost at all, claiming (Opp. 26-28) that the Alabama courts have decided that the insurance laws are inadequate and that therefore they, and not the legislature, will be in charge of policing insurance fraud. This argument is a model of circularity. It boils down to the contention that, whenever the Alabama courts don't like the result that consulting applicable fines will suggest, they may simply usurp the legislature and declare

themselves responsible for policing that area of law.[10] Perhaps the federal Constitution would permit state courts to do this prospectively; but because the purpose of the third *BMW* guidepost is to assist the reviewing court in determining whether the defendant had adequate notice of the magnitude of the punishment to which it could be subjected (*BMW*, 116 S. Ct. at 1603), courts may not facilely evade it merely by retrospectively announcing that statutory penalties do not reflect state policy.

4. *Profit.* Respondent does not even acknowledge, let alone answer, our argument that the punitive damages in this case are utterly disproportionate to any ill-gotten gain (which, because this case involves an isolated incident, could not be more than a few hundred dollars). Instead, she suggests that Union Security should be grateful that the Alabama Supreme Court considered two additional factors — Union Security's financial condition and the costs of litigation — to justify cutting the judgment in half, thus going "*beyond* this Court's mandate in *BMW*" to protect Union Security. Opp. 24 (emphasis in original). Needless to say, the court's consideration of two factors hardly excuses its inadequate treatment of the other factors.[11]

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[10] Respondent misleadingly asserts (Opp. 26-27) that the Alabama Supreme Court's refusal to apply the third guidepost is unique to the insurance area. In fact, the court first refused to apply the guidepost in the *BMW* remand. See *BMW of North America, Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997). There can be no question from the court's refusal to apply the guidepost in *BMW* itself that the Alabama Supreme Court intends to ignore it in every case in which the fine for comparable conduct is, in its view, "meager."

[11] The Alabama Supreme Court's treatment of financial condition and litigation costs was in any event far from adequate. For example, given the $1 million recovery that respondent obtained from the principal wrongdoer, it is impossible to understand how her litigation costs could support any significant punitive damages against Union Security.

Respectfully submitted.

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